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THE

LAWS OF ENGLAND.

VOLUME II.

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THE

LAWS OF ENGLAND

BEING

A COMPLETE STATEMENT OF THE WHOLE LAW OF ENGLAND.

BY

THE RIGHT HONOURABLE THE

EARL OF HALSBURY

LORD HIGH CHANCELLOR OF GREAT BRITAIN,
1885-86, 1886-92, and 1895-1905,

AND OTHER LAWYERS.

VOLUME II.

BANKRUPTCY AND INSOLVENCY.
BARRISTERS.
BASTARDY.
BILLS OF EXCHANGE.

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For Bankers and their position as to Cheques and Negotiable Instruments - - - - - - *See title* BANKRS AND BANKING.
Bank Notes - - - - - - ,, ,, ,,
Execution of Bills of Exchange etc. by Companies and Corporations ,, AGENCY; COMPANIES; CORPORATIONS.
Forgery and Fraud in connection with Bills of Exchange etc. - ,, CRIMINAL LAW AND PROCDURE.
Marketable Security - - - - ,, STOCK EXCHANGE.
Payment by Bill of Exchange etc. ,, CONTRACT; MONEY AND MONEY-LENDING.
Proof in Bankruptcy by Holder of Bill of Exchange etc. - - ,, BANKRUPTCY AND INSOLVENCY.

ABBREVIATIONS

USED IN THIS WORK.

A. C. (preceded by date) ..	Law Reports, Appeal Cases, House of Lords, since 1890 (*e.g.* [1891] A. C.)
A.-G.	Attorney-General
Act.	Acton's Reports, Prize Causes, 2 vols., 1809—1811
Ad. & El.	Adolphus and Ellis's Reports, King's Bench and Queen's Bench, 12 vols., 1831—1842
Adam	Adam's Justiciary Reports (Scotland), 1893—(current)
Add.	Addams' Ecclesiastical Reports, 3 vols., 1822—1826
Alc. & N.	Alcock and Napier's Reports, King's Bench (Ireland), 1 vol., 1813—1833
Alc. Reg. Cas.	Alcock's Registry Cases (Ireland), 1 vol., 1832—1841
Aleyn	Aleyn's Reports, King's Bench, fol., 1 vol., 1646—1649
Amb.	Ambler's Reports, Chancery, 2 vols., 1725—1783
And.	Anderson's Reports, Common Pleas, fol., 1 vol., 1535—1605
Andr.	Andrews' Reports, King's Bench, fol., 1 vol., 1737—1740
Anon.	Anonymous
Anst.	Anstruther's Reports, Exchequer, 3 vols., 1792—1797
App. Cas.	Law Reports, Appeal Cases, House of Lords, 15 vols., 1875—1890
Arkley	Arkley's Justiciary Reports (Scotland), 1 vol., 1846—1848
Arm. M. & O.	Armstrong, Macartney, and Ogle's Civil and Criminal Reports (Ireland), 1840—1842
Arn.	Arnold's Reports, Common Pleas, 2 vols., 1838—1839
Arn. & H.	Arnold and Hodges' Reports, Queen's Bench, 1 vol., 1840—1841
Asp. M. L. C.	Aspinall's Maritime Law Cases, 1870—(current)
Atk.	Atkyns' Reports, Chancery, 3 vols., 1736—1754
Ayl. Pan.	Ayliffe's New Pandect of Roman Civil Law.
Ayl. Par.	Ayliffe's Parergon Juris Canonici Anglicani.
B. & Ad...	Barnewall and Adolphus' Reports, King's Bench, 5 vols., 1830—1834
B. & Ald.	Barnewall and Alderson's Reports, King's Bench, 5 vols., 1817—1822
B. & C.	Barnewall and Cresswell's Reports, King's Bench, 10 vols., 1822—1830
B. & S.	Best and Smith's Reports, Queen's Bench, 10 vols., 1861—1870
Bac. Abr.	Bacon's Abridgment
Bail Ct. Cas.	Bail Court Cases (Lowndes and Maxwell), 1 vol., 1852—1854
Ball & B.	Ball and Beatty's Reports, Chancery (Ireland), 2 vols., 1807—1814

Bankr. & Ins. R. ..	Bankruptcy and Insolvency Reports, 2 vols., 1853—1855
Bar. & Arn.	Barron & Arnold's Election Cases, 1 vol., 1843—1846
Bar. & Aust.	Barron & Austin's Election Cases, 1 vol., 1842
Barn. (CH.)	Barnardiston's Reports, Chancery, fol., 1 vol., 1740—1741
Barn. (K. B.)	Barnardiston's Reports, King's Bench, fol., 2 vols., 1726—1734
Barnes	Barnes' Notes of Cases of Practice, Common Pleas, 1 vol., 1732—1760
Batt.	Batty's Reports, King's Bench (Ireland), 1 vol., 1825—1826
Beat.	Beatty's Reports, Chancery (Ireland), 1 vol., 1813—1830
Beav.	Beavan's Reports, Rolls Court, 36 vols., 1838—1866
Beav. & Wal.	Beavan and Walford's Railway Parliamentary Cases, 1 vol., 1846
Beaw.	Beawes's Lex Mercatoria
Bellewe	Bellewe's Cases *temp.* Richard II., King's Bench, 1 vol.
Bell, C. C.	T. Bell's Crown Cases Reserved, 1 vol., 1858—1860
Bell, Ct. of Sess. ..	R. Bell's Decisions, Court of Session (Scotland), 1 vol., 1790—1792
Bell, Ct. of Sess. fol. ..	R. Bell's Decisions, Court of Session (Scotland), fol., 1 vol., 1794—1795
Bell, Dict. Dec. ..	S. S. Bell's Dictionary of Decisions, Court of Session (Scotland), 2 vols., 1808—1833
Bell, Sc. App.	S. S. Bell's Scotch Appeals, House of Lords, 7 vols., 1842—1850
Belt's Sup.	Belt's Supplement to Vesey Sen., Chancery, 1 vol., 1746—1756
Benl.	Benloe's (or Bendloe's) Reports, King's Bench and Common Pleas, fol., 1 vol., 1515—1627
Ben. & D.	Benloe and Dalison's Reports, Common Pleas, fol., 1 vol., 1357—1579
Bing.	Bingham's Reports, Common Pleas, 10 vols., 1822—1834
Bing. (N. C.)	Bingham's New Cases, Common Pleas, 6 vols., 1834—1840
Bitt. Prac. Cas.	Bittleston's Practice Cases in Chambers under the Judicature Acts, 1873 and 1875, 1 vol., 1875—1876
Bitt. Rep. in Ch. ..	Bittleston's Reports in Chambers (Queen's Bench Division), 1 vol., 1883—1884
Bl. Com.	Blackstone's Commentaries
Bl. D. & Osb.	Blackham, Dundas, and Osborne's Reports, Practice and Nisi Prius (Ireland), 1 vol., 1846—1848
Bli.	Bligh's Reports, House of Lords, 4 vols., 1819—1821
Bli. (N. S.)	Bligh's Reports, House of Lords, New Series, 11 vols., 1827—1837
Bos. & P.	Bosanquet and Puller's Reports, Common Pleas, 3 vols., 1796—1804
Bos. & P. (N. R.) ..	Bosanquet and Puller's New Reports, Common Pleas, 2 vols., 1804—1807
Bract.	Bracton De Legibus et Consuetudinibus Angliæ
Bro. Abr.	Sir J. Brooke's Abridgment
Bro. C. C.	W. Brown's Chancery Reports, 4 vols., 1778—1794
Bro. Ecc. Rep.	W. G. Brooke's Ecclesiastical Reports, Privy Council, 1 vol., 1850—1872
Bro. (N. C.)	Sir R. Brooke's New Cases, 1 vol., 1515—1558
Bro. Parl. Cas.	J. Brown's Cases in Parliament, 8 vols., 1702—1800
Bro. Supp. to Mor. ..	M. P. Brown's Supplement to Morison's Dictionary of Decisions, Court of Session (Scotland), 5 vols.
Bro. Synop.	M. P. Brown's Synopsis of Decisions, Court of Session (Scotland), 4 vols., 1532—1827

Brod. & Bing.	Broderip and Bingham's Reports, Common Pleas, 3 vols., 1819—1822
Brod. & F.	Brodrick and Fremantle's Ecclesiastical Reports, Privy Council, 1 vol., 1705—1864
Broun	Broun's Justiciary Reports (Scotland), 2 vols., 1842—1845
Brown. & Lush. ..	Browning and Lushington's Reports, Admiralty, 1 vol., 1863—1866
Brownl.	Brownlow and Goldesborough's Reports, Common Pleas, 2 parts, 1569—1624
Bruce	Bruce's Decisions, Court of Session (Scotland), 1714—1715
Buchan.	Buchanan's Reports, Court of Session and Justiciary (Scotland), 1806—1813
Buck	Buck's Cases in Bankruptcy, 1 vol., 1816—1820
Bulst.	Bulstrode's Reports, King's Bench, fol., 3 parts in 1 vol., 1610—1626
Bunb.	Bunbury's Reports, Exchequer, fol., 1 vol., 1713—1741
Burr.	Burrow's Reports, King's Bench, 5 vols., 1756—1772
Burr. S. C.	Burrow's Settlement Cases, King's Bench, 1 vol., 1733—1776
Burrell	Burrell's Reports, Admiralty, ed. by Marsden, 1 vol., 1648—1840
C. A.	Court of Appeal
C. B.	Common Bench Reports, 18 vols., 1845—1856
C. B. (N. S.)	Common Bench Reports, New Series, 20 vols., 1856—1865
C. C. Ct. Cas.	Central Criminal Court Cases (Sessions Papers), 1834—(current)
C. L. R.	Common Law Reports, 3 vols., 1853—1855
C. P. D.	Law Reports, Common Pleas Division, 5 vols., 1875—1880
C. & P.	Carrington and Payne's Reports, Nisi Prius, 9 vols., 1823—1841
Cab. & El.	Cababé and Ellis's Reports, Queen's Bench Division, 1 vol., 1882—1885
Cald. Mag. Cas. ..	Caldecott's Magistrates Cases, 1 vol., 1777—1786
Calth.	Calthrop's City of London Cases, King's Bench, 1 vol., 1609—1618
Camp.	Campbell's Reports, Nisi Prius, 4 vols., 1807—1816
Carp. Pat. Cas.	Carpmael's Patent Cases, 2 vols., 1602—1842
Car. & Kir.	Carrington and Kirwan's Reports, Nisi Prius, 3 vols., 1815—1853
Car. & M.	Carrington and Marshman's Reports, Nisi Prius, 1 vol., 1841—1843
Cart.	Carter's Reports, Common Pleas, fol., 1 vol., 1664—1673
Carth.	Carthew's Reports, King's Bench, fol., 1 vol., 1687—1700
Cary	Cary's Reports, Chancery, 1 vol.
Cas. in Ch.	Cases in Chancery, fol., 3 parts, 1660—1697
Cas. Pract. K. B. ..	Cases of Practice, King's Bench, 1 vol., 1655—1775
Cas. Sett.	Cases of Settlements and Removals, 1 vol., 1689—1727
Cas. *temp.* Finch ..	Cases *temp.* Finch, Chancery, fol., 1 vol., 1673—1680
Cas. *temp.* King ..	Select Cases *temp.* King, Chancery, fol., 1 vol., 1724—1733
Cas. *temp.* Talb.	Cases in Equity *temp.* Talbot, fol., 1 vol., 1730—1737
Ch. (preceded by date) ..	Law Reports, Chancery Division, since 1890 (*e.g.* [1891] 1 Ch.)
Ch. App.	Law Reports, Chancery Appeals, 10 vols., 1865—1875
Ch. D.	Law Reports, Chancery Division, 45 vols., 1875—1890

Ch. Rob.	Christopher Robinson's Reports, Admiralty, 6 vols., 1798—1808
Char. Pr. Cas.	Charley's New Practice Reports, 3 vols., 1875—1876
Char. Cham. Cas.	Charley's Chamber Cases, 1 vol., 1875—1876
Chit.	Chitty's Practice Reports, King's Bench, 2 vols., 1770—1822
Cl. & Fin.	Clark and Finnelly's Reports, House of Lords, 12 vols., 1831—1846
Clay.	Clayton's Reports and Pleas of Assises at Yorke, 1 vol., 1631—1650
Clif. & Rick.	Clifford and Rickards' Locus Standi Reports, 3 vols., 1873—1884
Clif. & Steph.	Clifford and Stephens' Locus Standi Reports, 2 vols., 1867—1872
Cockb. & Rowe	Cockburn and Rowe's Election Cases, 1 vol., 1833
Co. Ent.	Coke's Entries
Co. Inst.	Coke's Institutes
Co. Litt.	Coke on Littleton (1 Inst.)
Co. Rep.	Coke's Reports, 13 parts, 1572—1616
Coll.	Collyer's Reports, Chancery, 2 vols., 1844—1846
Coll. Jurid.	Collectanea Juridica, 2 vols.
Colles	Colles' Cases in Parliament, 1 vol., 1697—1713
Colt.	Coltman's Registration Cases, 1 vol., 1879—1885
Com.	Comyns' Reports, King's Bench, Common Pleas, and Exchequer, fol., 2 vols., 1695—1740
Com. Cas.	Commercial Cases, 1895—(current)
Com. Dig.	Comyns' Digest
Comb.	Comberbach's Reports, King's Bench, fol., 1 vol., 1685—1698
Con. & Law.	Connor and Lawson's Reports, Chancery (Ireland), 2 vols., 1841—1843
Cooke & Al.	Cooke and Alcock's Reports, King's Bench (Ireland), 1 vol., 1833—1834
Cooke, Pr. Cas.	Cooke's Practice Reports, Common Pleas, 1 vol., 1706—1747
Cooke, Pr. Reg.	Cooke's Practical Register of the Common Pleas, 1 vol., 1702—1742
Coop. G.	G. Cooper's Reports, Chancery, 1 vol., 1792—1815
Coop. Pr. Cas.	C. P. Cooper's Reports, Chancery Practice, 1 vol., 1837—1838
Coop. *temp.* Brough.	C. P. Cooper's Cases *temp.* Brougham, Chancery, 1 vol., 1833—1834
Coop. *temp.* Cott.	C. P. Cooper's Cases *temp.* Cottenham, Chancery, 2 vols., 1846—1848 (and miscellaneous earlier cases)
Corb. & D.	Corbett and Daniell's Election Cases, 1 vol., 1819
Couper	Couper's Justiciary Reports (Scotland), 5 vols., 1868—1885
Cowp.	Cowper's Reports, King's Bench, 2 vols., 1774—1778
Cox, C. C.	E. W. Cox's Criminal Law Cases, 1843—(current)
Cox & Atk.	Cox and Atkinson's Registration Appeal Cases, 1 vol., 1843—1846
Cox, Eq. Cas.	S. C. Cox's Equity Cases, 2 vols., 1745—1797
Cox, M. & H.	Cox, Macrae, and Hertslet's County Courts Cases and Appeals, Vol. I., 1846—1852
Cr. & J.	Crompton and Jervis's Reports, Exchequer, 2 vols., 1830—1832
Cr. & M.	Crompton and Meeson's Reports, Exchequer, 2 vols., 1832—1834
Cr. M. & R.	Crompton, Meeson, and Roscoe's Reports, Exchequer, 2 vols., 1834—1835
Cr. & Ph.	Craig and Phillips' Reports, Chancery, 1 vol., 1840—1841
Craw. & D.	Crawford and Dix's Circuit Cases (Ireland), 3 vols., 1838—1846

Craw. & D. Abr. C. ..	Crawford and Dix's Abridged Cases (Ireland), 1 vol., 1837—1838
Cress. Insolv. Cas. ..	Cresswell's Insolvency Cases, 1 vol., 1827—1829
Cripps' Church Cas. ..	Cripps' Church and Clergy Cases, 2 parts, 1847—1850
Cro. Car.	Croke's Reports *temp.* Charles I., King's Bench and Common Pleas, 1 vol., 1625—1641
Cro. Eliz.	Croke's Reports *temp.* Elizabeth, King's Bench and Common Pleas, 1 vol., 1582—1603
Cro. Jac.	Croke's Reports *temp.* James I., King's Bench and Common Pleas, 1 vol., 1603—1625
Cru. Dig.	Cruise's Digest of the Law of Real Property, 7 vols.
Cunn.	Cunningham's Reports, King's Bench, fol., 1 vol., 1734—1735
Curt.	Curteis' Ecclesiastical Reports, 3 vols., 1834—1844
Dalr.	Dalrymple's Decisions, Court of Session (Scotland), fol., 1 vol., 1698—1720
Dan.	Daniell's Reports, Exchequer in Equity, 1 vol., 1817—1823
Dan. & Ll.	Danson and Lloyd's Mercantile Cases, 1 vol., 1828—1829
Dav. & Mer.	Davison and Merivale's Reports, Queen's Bench, 1 vol., 1843—1844
Dav. Pat. Cas.	Davies' Patent Cases, 1 vol., 1785—1816
Dav. Ir.	Davys' (or Davies' or Davy's) Reports (Ireland), 1 vol., 1604—1611
Day	Day's Election Cases, 1 vol., 1892—1893
Dea. & Sw.	Deane and Swabey's Ecclesiastical Reports, 1 vol., 1855—1857
Deac.	Deacon's Reports, Bankruptcy, 4 vols., 1834—1840
Deac. & Ch.	Deacon and Chitty's Reports, Bankruptcy, 4 vols., 1832—1835
Dears. & B.	Dearsly and Bell's Crown Cases Reserved, 1 vol., 1856—1858
Dears. C. C.	Dearsly's Crown Cases Reserved, 1 vol., 1852—1856
Deas & And.	Deas and Anderson's Decisions (Scotland), 5 vols., 1829—1832
De G.	De Gex's Reports, Bankruptcy, 1 vol., 1844—1848
De G. F. & J.	De Gex, Fisher, and Jones's Reports, Chancery, 4 vols., 1859—1862
De G. & J.	De Gex and Jones's Reports, Chancery, 4 vols., 1857—1859
De G. J. & Sm... ..	De Gex, Jones, and Smith's Reports, Chancery, 4 vols., 1862—1865
De G. M. & G.	De Gex, Macnaghten, and Gordon's Reports, Chancery, 8 vols., 1851—1857
De G. & Sm.	De Gex and Smale's Reports, Chancery, 5 vols., 1846—1852
Delane	Delane's Decisions, Revision Courts, 1 vol., 1832—1835
Den.	Denison's Crown Cases Reserved, 2 vols., 1844—1852
Dick.	Dickens' Reports, Chancery, 2 vols., 1559—1798
Dig.	Justinian's Digest or Pandects
Dirl.	Dirleton's Decisions, Court of Session (Scotland), fol., 1 vol., 1665—1677
Dods.	Dodson's Reports, Admiralty, 2 vols., 1811—1822
Donnelly	Donnelly's Reports, Chancery, 1 vol., 1836—1837
Doug. El. Cas.	Douglas' Election Cases, 4 vols., 1774—1776
Doug. (K. B.)	Douglas' Reports, King's Bench, 4 vols., 1778—1785
Dow	Dow's Reports, House of Lords, 6 vols., 1812—1818
Dow & Cl.	Dow and Clark's Reports, House of Lords, 2 vols., 1827—1832
Dow. & L.	Dowling and Lowndes' Practice Reports, 7 vols., 1843—1849

Dow. & Ry. (K. B.)	Dowling and Ryland's Reports, King's Bench, 9 vols., 1822—1827
Dow. & Ry. (M. C.)	Dowling and Ryland's Magistrates' Cases, 4 vols., 1822—1827
Dow. & Ry. (N. P.)	Dowling and Ryland's Reports, Nisi Prius, 1 part, 1822—1823
Dowl.	Dowling's Practice Reports, 9 vols., 1830—1841
Dowl. (N. S.)	Dowling's Practice Reports, New Series, 2 vols., 1841—1843
Dr. & Wal.	Drury and Walsh's Reports, Chancery (Ireland), 2 vols., 1837—1841
Dr. & War.	Drury and Warren's Reports, Chancery (Ireland), 4 vols., 1841—1843
Drew.	Drewry's Reports, Chancery, 4 vols., 1852—1859
Drew. & Sm.	Drewry and Smale's Reports, Chancery, 2 vols., 1859—1865
Drinkwater	Drinkwater's Reports, Common Pleas, 1 vol., 1839
Drury *temp.* Nap.	Drury's Reports *temp.* Napier, Chancery (Ireland), 1 vol., 1858—1859
Drury *temp.* Sug.	Drury's Reports *temp.* Sugden, Chancery (Ireland), 1 vol., 1841—1844
Dugd. Orig.	Dugdale's Origines Juridiciales
Dunl. (Ct. of Sess.)	Dunlop, Court of Session Cases (Scotland), 2nd series, 24 vols., 1838—1862
Dunning	Dunning's Reports, King's Bench, 1 vol., 1753—1754
Durie	Durie's Decisions, Court of Session (Scotland), fol., 1 vol., 1621—1642
Dyer	Dyer's Reports, King's Bench, 3 vols., 1513—1581
E. & B.	Ellis and Blackburn's Reports, Queen's Bench, 8 vols., 1852—1858
E. & E.	Ellis and Ellis's Reports, Queen's Bench, 3 vols., 1858—1861
E. B. & E.	Ellis, Blackburn, and Ellis's Reports, Queen's Bench, 1 vol., 1858—1860
Eag. & Y.	Eagle and Younge's Tithe Cases, 4 vols., 1223—1825
East	East's Reports, King's Bench, 16 vols., 1800—1812
East, P. C.	East's Pleas of the Crown
Ecc. & Ad.	Spinks' Ecclesiastical and Admiralty Reports, 2 vols., 1853—1855
Eden	Eden's Reports, Chancery, 2 vols., 1757—1766
Edgar	Edgar's Decisions, Court of Session (Scotland), fol., 1724—1725
Edw.	Edwards' Reports, Admiralty, 1 vol., 1808—1812
Elchies	Elchies' Decisions, Court of Session (Scotland), 2 vols., 1733—1754
Eng. Pr. Cas.	Roscoe's English Prize Cases, 2 vols., 1745—1858
Eq. Cas. Abr.	Abridgment of Cases in Equity, fol., 2 vols., 1667—1744
Eq. Rep.	Equity Reports, 3 vols., 1853—1855
Esp.	Espinasse's Reports, Nisi Prius, 6 vols., 1793—1810
Exch.	Exchequer Reports (Welsby, Hurlstone, and Gordon), 11 vols., 1847—1856
Ex. D.	Law Reports, Exchequer Division, 5 vols., 1875—1880
F. & F.	Foster and Finlason's Reports, Nisi Prius, 4 vols., 1856—1867
F. (Ct. of Sess.)	Fraser, Court of Session Cases (Scotland), 5th series, 1898—1906
Fac. Coll. (with date)	Faculty of Advocates, Collection of Decisions, Court of Session (Scotland), fol., 1st and 2nd series, 21 vols., 1752—1825

Fac. Coll. (N. S.) (with date)	Faculty of Advocates, Collection of Decisions, Court of Session (Scotland), New Series, 16 vols., 1825—1841
Falc.	Falconer's Decisions, Court of Session (Scotland), 2 vols., fol., 1744—1751
Falc. & Fitz.	Falconer and Fitzherbert's Election Cases, 1 vol., 1835—1838
Ferg.	Ferguson's Consistorial Decisions (Scotland), 1 vol., 1811—1817
Fitz-G.	Fitz-Gibbons' Reports, King's Bench, fol., 1 vol., 1728—1731
Fitz. Nat. Brev. ..	Fitzherbert's Natura Brevium
Fl. & K.	Flanagan and Kelly's Reports, Rolls Court (Ireland), 1 vol., 1840—1842
Fonbl.	Fonblanque's Reports, Bankruptcy, 2 parts, 1849—1852
For.	Forrest's Reports, Exchequer, 1 vol., 1800—1801
Forb.	Forbes' Decisions, Court of Session (Scotland), fol., 1 vol., 1705—1713
Fort. De Laud. ..	Fortescue, De Laudibus Legum Angliæ
Fortes. Rep.	Fortescue's Reports, fol., 1 vol., 1692—1736
Fost.	Foster's Crown Cases, 1 vol., 1743—1760
Fount.	Fountainhall's Decisions, Court of Session (Scotland), fol., 2 vols., 1678—1712
Fox & S. Ir.	M. C. Fox and T. B. C. Smith's Reports, King's Bench (Ireland), 2 vols., 1822—1825
Fox & S. Reg.	J. S. Fox and C. L. Smith's Registration Cases, 1 vol., 1886—1895
Freem. (CH.)	Freeman's Reports, Chancery, 1 vol., 1660—1706
Freem. (K. B.)	Freeman's Reports, King's Bench and Common Pleas, 1 vol., 1670—1704
Gal. & Dav.	Gale and Davison's Reports, Queen's Bench, 3 vols., 1841—1843
Gale	Gale's Reports, Exchequer, 2 vols., 1835—1836
Gib. Cod.	Gibson's Codex Juris Ecclesiastici Anglicani
Giff.	Giffard's Reports, Chancery, 5 vols., 1857—1865
Gilb.	Gilbert's Cases in Law and Equity, 1 vol., 1713—1714
Gilb. C. P.	Gilbert's History and Practice of the Court of Common Pleas
Gilb. (CH.)	Gilbert's Reports, Chancery and Exchequer, fol., 1 vol., 1706—1726
Gilm. & F.	Gilmour and Falconer's Decisions, Court of Session (Scotland), 2 parts, Part I. (Gilmour) 1661—1666, Part II. (Falconer) 1681—1686
Gl. & J.	Glyn and Jameson's Reports, Bankruptcy, 2 vols., 1819—1828
Glanv.	Glanville, De Legibus et Consuetudinibus Regni Angliæ
Glanv. El. Cas.	Glanville's Election Cases, 1 vol., 1623—1624
Glascock	Glascock's Reports (Ireland), 1 vol., 1831—1832
Godb.	Godbolt's Reports, King's Bench, Common Pleas, and Exchequer, 1 vol., 1574—1637
Gouldsb.	Gouldsborough's Reports, Queen's Bench and King's Bench, 1 vol., 1586—1601
Gow	Gow's Reports, Nisi Prius, 1 vol., 1818—1820
Gwill.	Gwillim's Tithe Cases, 4 vols., 1224—1824
H. & C.	Hurlstone and Coltman's Reports, Exchequer, 4 vols., 1862—1866
H. & N.	Hurlstone and Norman's Reports, Exchequer, 7 vols., 1856—1862

H. & Tw.	Hall and Twells' Reports, Chancery, 2 vols., 1848—1850
H. & W.	Hurlstone and Walmsley's Reports, Exchequer, 1 vol., 1840—1841
H. L. Cas.	Clark's Reports, House of Lords, 11 vols., 1847—1866
Hag. Adm.	Haggard's Reports, Admiralty, 3 vols., 1822—1838
Hag. Con.	Haggard's Consistorial Reports, 2 vols., 1789—1821
Hag. Ecc.	Haggard's Ecclesiastical Reports, 4 vols., 1827—1833
Hailes	Hailes's Decisions, Court of Session (Scotland), 2 vols., 1766—1791
Hale, C. L.	Hale's Common Law
Hale, P. C.	Hale's Pleas of the Crown, 2 vols.
Har. & Ruth.	Harrison and Rutherfurd's Reports, Common Pleas, 1 vol., 1865—1866
Har. & W.	Harrison and Wollaston's Reports, King's Bench and Bail Court, 2 vols., 1835—1836
Harc.	Harcarse's Decisions, Court of Session (Scotland), fol., 1 vol., 1681—1691
Hard.	Hardres' Reports, Exchequer, fol., 1 vol., 1655—1669
Hare	Hare's Reports, Chancery, 11 vols., 1841—1853
Hawk. P. C.	Hawkins's Pleas of the Crown, 2 vols.
Hayes	Hayes's Reports, Exchequer (Ireland), 1 vol., 1830—1832
Hayes & Jo.	Hayes and Jones's Reports, Exchequer (Ireland), 1 vol., 1832—1834
Hem. & M.	Hemming and Miller's Reports, Chancery, 2 vols., 1862—1865
Het.	Hetley's Reports, Common Pleas, fol., 1 vol., 1627—1631
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Part I.—Bankruptcy.

SECT. 1.—*Bankruptcy Jurisdiction.*

SUB-SECT. 1.—*In General.*

Definition.

1. Bankruptcy is a proceeding by which, when a debtor cannot pay his debts or discharge his liabilities, or the persons to whom he owes money or has incurred liabilities cannot obtain satisfaction of their claims, the State, in certain circumstances, takes possession of his property by an officer appointed for the purpose, and such property is realised and distributed in equal proportions amongst the persons to whom the debtor owes money or has incurred pecuniary liabilities (*a*). The debtor at the same time obtains protection from legal proceedings by the persons to whom he has incurred debts or liabilities, subject to certain clearly defined exceptions (*b*), and if he has not been guilty of serious misconduct, can obtain a discharge from his debts and liabilities, subject also to certain clearly defined exceptions (*c*). When a man becomes bankrupt, he is, during the bankruptcy, subject to certain disqualifications as a citizen (*d*). Although no longer looked upon as a crime, as it once was, bankruptcy is considered to involve a change of status, and to carry with it *quasi*-penal consequences (*e*).

Bankruptcy Acts.

2. Bankruptcy is entirely the creation of statute law. There is no such thing as a common law of bankruptcy. From very early times successive Bankruptcy Acts have been enacted giving jurisdiction

(*a*) 2 Bl. Com. 472.
(*b*) Bankruptcy Act, 1883 (46 & 47 Vict. c. 52), ss. 9, 10.
(*c*) *Ibid.*, ss. 29, 30.
(*d*) *Ibid.*, ss. 32—36.
(*e*) 2 Bl. Com. 471; *Re Howes, Ex parte Hughes*, [1892] 2 Q. B. 628, *per* BOWEN, L.J., at p. 632.

SUB-SECT. 1. In General.

to tribunals constituted by the Acts to administer the estates of bankrupt debtors and discharge them from their debts. The earliest statute of the kind is the 34 & 35 Hen. 8, c. 4, which was shortly afterwards followed by the 13 Eliz. c. 7, and 1 James 1, c. 15, and 21 James 1, c. 19. Under the successive Bankruptcy Acts the courts and judges who have administered them from time to time have laid down certain rules and principles governing the administration of the Acts (*f*), and many of those rules have become part of the established bankruptcy law of the country, although not in terms to be found in any Bankruptcy Act (*g*).

Acts now in force.

The law of bankruptcy at present in force in England is enacted by the Bankruptcy Acts of 1883 and 1890 (*h*), which form substantially a complete code of the existing law (*i*); and all preceding Bankruptcy Acts have been formally repealed by Parliament, but the repeals of successive Bankruptcy Acts have always been subject to an exception in favour of proceedings which were instituted and are pending under the Act which has been repealed, unless and except so far as the procedure of the new Act has been applied to such proceedings (*j*). There are in existence bankruptcies which have not been concluded which were instituted under the Acts which were in force before 1883, and although, for some purposes, those bankruptcies are regulated by the Acts now in force, for other purposes the Acts under which they were instituted still apply to them (*k*).

Rules.

The provisions of the Bankruptcy Acts are supplemented by rules made under powers given by the Acts (*l*) which contain regulations providing for the legal procedure and administrative machinery of bankruptcy proceedings.

Extent of bankruptcy jurisdiction.

3. The power to administer bankrupts' estates and to discharge bankrupts from their debts is vested in certain of the courts of

(*f*) The earliest rules of the judges were those made under the statute 34 & 35 Hen. 8, c. 4. Lord King's rule and Lord Loughborough's rule as to administration of joint and separate estates are later instances of rules of administration made by the courts.

(*g*) Instances of rules of bankruptcy law not to be found specifically enacted in bankruptcy statutes are the rule that the debt on which a bankruptcy petition is founded must be a debt which existed at the time when the act of bankruptcy was committed, which has been termed part of the common law of bankruptcy (*Ex parte Hayward, Re Hayward* (1871), 6 Ch. App. 546), and the rule that if a principal creditor proves for the whole of his claim against the bankrupt's estate the surety who has paid the amount of his liability cannot also prove against the bankrupt's estate on the contract to indemnify him (*Re Oriental Commercial Bank, Ex parte European Bank* (1871), 7 Ch. App. 99, at p. 103).

(*h*) 46 & 47 Vict. c. 52; 53 & 54 Vict. c. 71.

(*i*) *Ex parte Reynolds, Re Barnett* (1885), 15 Q. B. D. 169, *per* Lord ESHER, M.R., at p. 186.

(*j*) See, for example, the Bankruptcy Repeal Act, 1869 (32 & 33 Vict. c. 83), s. 20, and the Bankruptcy Act, 1883 (46 & 47 Vict. c. 52), s. 169 (3), and the Interpretation Act, 1889 (52 & 53 Vict. c. 63), s. 38.

(*k*) See the Bankruptcy Discharge and Closure Act, 1887 (50 & 51 Vict. c. 66), s. 4; the Bankruptcy Act, 1883 (46 & 47 Vict. c. 52), s. 94, and ss. 159, 161. See also *Re Clagett, Ex parte Lewis*, [1888] W. N. 100, a case of an insolvency under the Insolvent Debtors Act, 1838 (1 & 2 Vict. c. 110), and a bankruptcy under the Bankruptcy Acts, 1849 and 1854; *Ex parte Revell, Re Tollemache* (1884), 13 Q. B. D. 720; *Ex parte Edwards, Re Tollemache* (1884), 14 Q. B. D. 415, where the bankruptcy was under the statute 6 Geo. 4, c. 16. The law under the old Bankruptcy Acts so far as it still exists and is of practical application is referred to, p. 324, *post*.

(*l*) Bankruptcy Act, 1883 (46 & 47 Vict. c. 52), s. 127.

SUB-SECT. 1. In General.

justice, which exercise what is termed bankruptcy jurisdiction. The jurisdiction of each bankruptcy court is partly local and partly imperial (*m*). As regards the local jurisdiction of each bankruptcy court, it is confined to the classes of debtors who, by the express terms of the Bankruptcy Acts, are made subject to its jurisdiction either by domicile or residence (*n*). The imperial nature of the jurisdiction consists in this, that the powers of the bankruptcy courts to discharge debtors from their debts extend to all debts wherever contracted; that is to say, the discharge of a debtor by a court exercising bankruptcy jurisdiction in England will discharge a debt contracted by the debtor in one of the colonies or colonial States or in India (*o*), and the provisions as to the vesting of property in the officer appointed to collect and distribute it extend all over the Empire, so that, when a man is made bankrupt by a bankruptcy court in England, property which he has in the colonies or colonial States or in India will become distributable by the English trustee in the bankruptcy, who can enforce his title to it (*p*).

SUB-SECT. 2.—*Courts and Officers exercising Jurisdiction.*

Supreme Court of Judicature.

4. In England the courts which are invested with bankruptcy jurisdiction are the High Court and certain county courts (*q*). Before the passing of the Act of 1883 the court which exercised jurisdiction in bankruptcy was a separate court of record named the London Bankruptcy Court (*r*). The jurisdiction of that court, which still exists for the purpose of completing the administration of bankruptcies which took place during its existence as a separate court, has been transferred to the Supreme Court of Judicature, and, so far as it exists, is exercised by the High Court of Justice (*s*). The Supreme Court of Judicature also exercises appellate jurisdiction in bankruptcy, as it hears and determines appeals from the High Court in bankruptcy matters (*t*).

(*m*) See as to bankruptcy jurisdiction generally *Ex parte Cridland* (1814), 3 Ves. & B. 94; *Ex parte Blain, Re Sawers* (1879), 12 Ch. D. 522; *Cooke* v. *Charles A. Vogeler Co.*, [1901] A. C. 102.

(*n*) Bankruptcy Act, 1883 (46 & 47 Vict. c. 52), ss. 4, 6, 95; *Ex parte Crispin, Re Crispin* (1873), 8 Ch. App. 374; *Ex parte Pearson, Re Pearson*, [1892] 2 Q. B. 263; *Re Clark, Ex parte Beyer, Peacock & Co., Ltd.*, [1896] 2 Q. B. 476; *Ex parte Clark, Re Clark*, [1898] 1 Q. B. 20; *Cooke* v. *Charles A. Vogeler Co., supra; Dulaney* v. *Merry & Son*, [1901] 1 K. B. 536. There is no jurisdiction to allow bankruptcy proceedings to be begun in the English courts against a foreigner who is not in England, but a foreigner who comes into England may, if indebted to a creditor in England, be subjected to bankruptcy proceedings, and can take advantage of them. See p. 9, *post.*

(*o*) *Bartley* v. *Hodges* (1861), 30 L. J. (Q. B.) 352; *Ellis* v. *M'Henry* (1871), L. R. 6 C. P. 228.

(*p*) Bankruptcy Act, 1883 (46 & 47 Vict. c. 52), ss. 118, 119, 168; *Callender, Sykes & Co.* v. *Colonial Secretary of Lagos and Davies*, [1891] A. C. 460. As to the title to real estate in the British dominions beyond the seas, see *Selkrig* v. *Davies* (1814), 2 Rose, 97; *Cockerell* v. *Dickens*, 1 Mont. D. & De G. 45, at p. 79; and *Ex parte Rogers, Re Boustead* (1881), 16 Ch. D. 665.

(*q*) Bankruptcy Act, 1883 (46 & 47 Vict. c. 52), s. 92.

(*r*) See the Bankruptcy Act, 1869 (32 & 33 Vict. c. 71), and the Bankruptcy Act, 1883 (46 & 47 Vict. c. 52), ss. 93, 94.

(*s*) Bankruptcy Act, 1883 (46 & 47 Vict. c. 52), s. 94.

(*t*) *Ibid.*, s. 104 (2) (b). As to appeals, see pp. 301 *et seq.*, *post.*

High Court of Justice.

5. The High Court of Justice exercises all the jurisdiction of the London Bankruptcy Court in matters instituted in that court which are still pending (*u*), and, as regards the persons who are subject to English bankruptcy jurisdiction, it exercises bankruptcy jurisdiction over a debtor who has resided or carried on business within the London bankruptcy district for the greater part of six months next preceding the commencement of bankruptcy proceedings against him, or for a longer period during those six months than in the district of any county court, and also over a debtor who is not resident in England, or whose address cannot be found (*a*).

The High Court also exercises appellate jurisdiction, determining appeals from the county courts (*b*).

The jurisdiction of the High Court is exercised by one of the judges of the High Court appointed for the purpose by the Lord Chancellor (*c*), and by five registrars in bankruptcy appointed by the Lord Chancellor, each of whom exercises part of the jurisdiction as defined in the Bankruptcy Acts, and also exercises by delegation from the judge part of the judge's jurisdiction and powers (*d*).

County courts.

6. The county courts which have bankruptcy jurisdiction are the county courts other than those which, by orders of the Lord Chancellor, are excluded from exercising bankruptcy jurisdiction. The Lord Chancellor has power to attach part of the district of one county court to another county court for the purposes of bankruptcy jurisdiction (*e*). Each county court which has bankruptcy jurisdiction has jurisdiction throughout England, and has, in addition to its ordinary powers, all the powers and jurisdiction of the High Court. The jurisdiction is exercisable by the judge of the county court and by the registrars of the court, and for the purposes of this jurisdiction the places of sitting are the towns in which the ordinary sittings of the county court are held (*f*).

Official receivers.

7. Bankruptcy administration is conducted not only by the judges and registrars of the courts, but by certain officers established for the purpose of administering bankrupts' estates. These are, firstly, official receivers in bankruptcy.

Each court which has bankruptcy jurisdiction has attached to it one or more official receivers (*g*). An official receiver is appointed by the Board of Trade, and is an officer of that department, but at the same time is an officer of the court to which he is attached. The duties of the official receiver relate both to the administration of

(*u*) Bankruptcy Act, 1883 (46 & 47 Vict. c. 52), s. 94.

(*a*) *Ibid.*, s. 95.

(*b*) See Bankruptcy Appeals (County Courts) Act, 1884 (47 Vict. c. 9). As to these appeals, see p. 303, *post*.

(*c*) See the Bankruptcy Act, 1883 (46 & 47 Vict. c. 52), s. 94 (2).

(*d*) *Ibid.*, s. 99 (1); Bankruptcy Rules, 1886, r. 7. One of the bankruptcy registrars acts as registrar in the winding-up of companies, so that the actual number of the registrars who act in bankruptcy matters is four.

(*e*) Bankruptcy Act, 1883 (46 & 47 Vict. c. 52), s. 92. See also the order of the Lord Chancellor of May 19, 1899, which sets out the county courts which are excluded from the exercise of bankruptcy jurisdiction.

(*f*) Bankruptcy Act, 1887 (46 & 47 Vict. c. 52), ss. 99, 100; Bankruptcy Rules, r. 98.

(*g*) Bankruptcy Act, 1887 (46 & 47 Vict. c. 52), ss. 66, 67.

SUB-SECT. 2. Courts and Officers.

a debtor's estate and to the investigation of the conduct of the debtor who has come within the jurisdiction of the bankruptcy court (*h*). As regards the debtor's conduct, it is the duty of the official receiver to investigate it, to take part in the public examination of the debtor, and to report to the court upon his conduct, and take part in prosecuting the debtor when he ought to be prosecuted. As regards the debtor's estate, he acts as receiver and manager of it in the initial stages of the proceedings, and performs other duties in the conduct of a bankruptcy which will be hereafter noticed in detail (*i*).

Trustees.

The other principal officers concerned in the administration of bankrupts' estates are trustees of the property of bankrupt debtors. A trustee is a person chosen by creditors at a meeting convened under the provisions of the Bankruptcy Acts, and certified by the Board of Trade as a proper person to be trustee. When a trustee has been chosen and certified he becomes an officer of the court, and it is his duty to realise the property of a bankrupt debtor and distribute it in dividends amongst the creditors, and all the property of the bankrupt, wherever situate and of whatever kind, subject to a few defined exceptions, becomes vested in the trustee, and all courts of justice throughout the Empire are bound to give effect to the title of the trustee to property which thus becomes vested in him (*k*).

Board of Trade.

The remaining official body which is concerned with the administration of bankrupts' estates under the present law is the Board of Trade as a State department. The Board of Trade, which really is a committee of the Privy Council originally appointed for the purposes of trade and plantations, is invested with a statutory duty, which, to some extent, was formerly exercised by the court, of supervising the administration of bankrupts' estates and those who have to administer them. This department certifies the appointments of the trustees, supervises and controls official receivers, and controls and enforces upon official receivers and trustees the performance of their duties in administering bankrupts' estates, and in investigating the conduct of bankrupts; it also audits the accounts of official receivers and trustees, and has power to disallow remuneration to trustees and to disallow items in their accounts which have been wrongly charged (*l*).

SUB-SECT. 3.—*Persons subject to the Bankruptcy Law.*

Who may be made bankrupt.

8. Subject to certain exceptions and qualifications hereinafter set out, any man or woman who is within the jurisdiction of a court having bankruptcy jurisdiction (*m*), and who owes a debt or

(*h*) Bankruptcy Act, 1883 (46 & 47 Vict. c. 52), s. 68.
(*i*) *Ibid.*, ss. 69, 70. See pp. 98 *et seq.*, *post.*
(*k*) *Ibid.*, ss. 21, 22, 54, 58, 169. See *Callender, Sykes & Co.* v. *Colonial Secretary of Lagos and Davies*, [1891] A. C. 460; *Ex parte James, Re Condon* (1874), 9 Ch. App. 609, at p. 614; *Ex parte Simmons, Re Carnac* (1885), 16 Q. B. D. 308. See generally, as to trustees, pp. 108 *et seq.*, *post.*
(*l*) Bankruptcy Act, 1883 (46 & 47 Vict. c. 52), ss. 22, 70, 72, 73, 78, 91. As to the Board of Trade, see title CONSTITUTIONAL LAW.
(*m*) See p. 6, *ante.*

SUB-SECT. 3. Persons subject to Bankruptcy Law.

debts the payment of which can be enforced against him or her personally, can be made a bankrupt (*n*). Except in the case of married women, there is now no distinction between traders and non-traders as regards liability to be made bankrupt, although certain incidents of bankruptcy law apply only to persons who carry on a trade or business (*o*).

Foreigners.

9. To render a foreigner liable to bankruptcy proceedings in this country, he must either have committed an act of bankruptcy in England, or become liable in England to be committed to prison for not paying a debt due on a judgment recovered against him and enforceable in England. Therefore, although possessing a place of business and contracting debts in England, a foreigner cannot be made bankrupt either while residing abroad or upon an act committed abroad which, if committed in Engand, would be an act of bankruptcy (*p*). Consequently service outside the jurisdiction of a bankruptcy notice upon a judgment debtor who is a foreigner resident abroad will not be ordered (*q*), though such a notice may be served if he comes temporarily within the jurisdiction (*r*). But where there is jurisdiction to commit a judgment debtor under the Debtors Act, 1869 (*s*), a receiving order in lieu of committal (*t*) may be made against a foreign debtor, notwithstanding the fact that he has not fulfilled the conditions as to domicile and residence which would be required for the presentation of a bankruptcy petition against him (*a*).

Married women.

10. Every married woman who carries on a trade separately from her husband and who commits an act of bankruptcy (*b*) is, in respect of her separate property, subject to the bankruptcy laws in the same way as if she were a *feme sole* (*c*).

Separate trading.

To satisfy this provision of the law a married woman must be an independent trader (*d*), and not accountable for the profits of her trade to her husband (*e*), and the trade must be her separate

(*n*) Bankruptcy Act, 1883 (46 & 47 Vict. c. 52), ss. 4, 6 (1) (d), 103.

(*o*) *E.g.*, on the question of "reputed ownership." See p. 173, *post*.

(*p*) *Ex parte Clark, Re Clark*, [1898] 1 Q. B. 20; Bankruptcy Act, 1883 (46 & 47 Vict. c. 52), s. 103; *Cooke* v. *Charles A. Vogeler Co.*, [1901] A. C. 102; *Ex parte Crispin, Re Crispin* (1873), 8 Ch. App. 374; *Ex parte Blain, Re Sawers* (1879), 12 Ch. D. 522. The two last-named cases were decided before the commencement of the Bankruptcy Act, 1883, but are authorities for the proposition that under that Act an act done by a foreigner cannot be an act of bankruptcy unless done within the jurisdiction of the bankruptcy court. See p. 5, *ante*, where the extent of the jurisdiction of the courts of bankruptcy is dealt with.

(*q*) *Ex parte Pearson, Re Pearson*, [1892] 2 Q. B. 263. See further, p. 28, *post*.

(*r*) *Re Clark, Ex parte Beyer, Peacock & Co., Ltd.*, [1896] 2 Q. B. 476.

(*s*) 32 & 33 Vict. c. 62, s. 5. See generally, for proceedings under the Debtors Acts, pp. 337 *et seq.*, *post*.

(*t*) Bankruptcy Act, 1883 (46 & 47 Vict. c. 52), s. 103 (5), and see p. 344, *post*.

(*a*) *Ex parte Clark, Re Clark, supra*.

(*b*) A bankruptcy notice cannot be issued against a married woman (*Re Lynes, Ex parte M. Lester & Co.*, [1893] 2 Q. B. 113). See further, p. 27, *post*.

(*c*) Married Women's Property Act, 1882 (45 & 46 Vict. c. 75), s. 1 (5); Bankruptcy Act, 1883 (46 & 47 Vict. c. 52), s. 152.

(*d*) See *Re Bond* (1888), 21 Q. B. D. 17.

(*e*) *Ex parte Harvey, Re Edwards* (1895), 2 Mans. 182.

SUB-SECT. 3. Persons subject to Bankruptcy Law.

property, and not under her husband's control (*f*). The mere fact that she possesses separate property, or that the interest which she possesses in a trade is her separate property, is not sufficient (*g*). But she is not protected from bankruptcy because a trade which is, in fact, her separate property is carried on by her in the dwelling-house of herself and her husband and with his assistance (*h*). Separate trading by a married woman is considered to continue for the purposes of her liability to be made bankrupt, notwithstanding that her business has been sold, as long as any of her trade liabilities remain unsatisfied (*i*).

Separate property.

Separate property (*k*) includes only that which would, if the woman were unmarried, be her property; and therefore a married woman who is made bankrupt as a separate trader cannot be compelled to exercise in favour of the trustee of her property a general power of appointment reserved to her in her marriage settlement (*l*), though in the same circumstances a married woman's life interest under a marriage settlement passes to the trustee in her bankruptcy (*m*). The liability of a married woman to be made a bankrupt is, in practice, further qualified by the fact that a bankruptcy notice cannot be issued against her (*n*).

Single women and widows.

A single woman who marries after the filing, but before the hearing, of a petition against her, cannot be made bankrupt unless it can be shown that she is a separate trader (*o*). A widow cannot be made bankrupt on a bankruptcy notice founded on a judgment which was recovered against her separate estate during her husband's lifetime (*p*).

Lunatics so found.

11. A lunatic is liable to be made a bankrupt in the sense that the bankruptcy courts have power to declare him bankrupt, and to administer his estate as a bankrupt, but he is incapable of committing any act of bankruptcy which is the result of intention or of the exercise of his will; and therefore it is only in particular cases that a lunatic is subject to a liability to be made bankrupt (*q*). It was held under the Bankruptcy Acts which were in force before

(*f*) *Ex parte Helsby, Re Helsby* (1893), 1 Mans. 12.

(*g*) *Ex parte Coulson, Re Gardiner* (1887), 20 Q. B. D. 249.

(*h*) *Re Worsley*, [1901] 1 K. B. 309.

(*i*) *Re Dagnall, Ex parte Soan and Miley*, [1896] 2 Q. B. 407; *Re Worsley, supra.*

(*k*) For her separate property generally, see title HUSBAND AND WIFE.

(*l*) *Ex parte Gilchrist, Re Armstrong* (1886), 17 Q. B. D. 521.

(*m*) *Re Armstrong, Ex parte Boyd* (1888), 21 Q. B. D. 264.

(*n*) *Re Lynes, Ex parte M. Lester & Co.*, [1893] 2 Q. B. 113; see p. 27, *post.* The liability of a married woman to be made bankrupt on other acts of bankruptcy is not therefore excluded (*ibid., per* Lord ESHER, M.R., at p. 114). Nor can a receiving order be made against her if she is trading separately under a firm name upon an alleged act of bankruptcy committed by non-compliance with a bankruptcy notice founded on a judgment against the firm (*Re Frances Handford & Co., Ex parte Frances Handford*, [1899] 1 Q. B. 566). See further, p. 28, *post.*

(*o*) *Re a Debtor*, [1898] 2 Q. B. 576.

(*p*) *Re Hewett, Ex parte Levene*, [1895] 1 Q. B. 328; and see *Re Lynes, Ex parte M. Lester & Co., supra.*

(*q*) *Re Farnham*, [1895] 2 Ch. 799, and see *Anon.* (1807), 13 Ves. 590; *Ex parte Layton* (1801), 6 Ves. 434, 440.

1883 that in the case of a lunatic not so found by inquisition a liquidation petition could not be presented on his behalf by a next friend (*a*), and that a lunatic could not commit an act of bankruptcy by omitting to give security on a trader-debtor summons (*b*). But at the present time a lunatic so found by inquisition can act in respect of bankruptcy matters by his committee or *curator bonis* (*c*). Therefore, where the court in lunacy is satisfied that it is for the interest of a lunatic that he should be made a bankrupt, it can direct his committee to file in the bankruptcy court a declaration of inability to pay debts, or to present a petition in bankruptcy, or to consent to a receiving order or an adjudication on his behalf (*d*). The power of the committee, however, to take further steps in the proceedings is subject to the directions of the court which exercises jurisdiction in lunacy (*e*).

Lunatics not so found.

Where it appears that any debtor, creditor, or other person affected by bankruptcy proceedings is a lunatic not so found by inquisition, the court of bankruptcy has power to appoint a representative of such lunatic to act for him in such proceedings with or without previous application being made for the appointment (*f*).

The application for appointment may be made by any person already appointed by a competent court to manage the affairs of the lunatic, or by a relative or friend of the lunatic if found suitable by the court, or by the official receiver (*g*). The application may be made *ex parte* or, if considered necessary by the court, on notice to the official receiver or trustee, if any, or to the petitioning creditor, or to the lunatic, or to any other person (*h*), and when made by a person other than the official receiver must be supported by medical evidence on affidavit (*i*). In the case of an application by the official receiver it may be supported by his report, which is received as *primâ facie* evidence of the facts stated in it (*i*). Service of notices upon a person so appointed has the same effect as service upon the lunatic (*j*).

Infants.

12. It appears that an infant, owing to his incapacity to make a valid contract (*k*), cannot be made bankrupt (*l*), nor can he alter his legal status as an infant by himself presenting a bankruptcy

(*a*) *Ex parte Cahen, Re Cahen* (1879), 10 Ch. D. 183.
(*b*) *Ex parte Stamp, Re Spence* (1846), De G. 345.
(*c*) Bankruptcy Act, 1883 (46 & 47 Vict. c. 52), s. 148.
(*d*) *Re James* (1884), 12 Q. B. D. 332; *Re Lee* (1883), 23 Ch. D. 216; *Re R. S. A.*, [1901] 2 K. B. 32.
(*e*) *Re R. S. A., supra.* For the jurisdiction in lunacy in general, see title LUNATICS AND PERSONS OF UNSOUND MIND.
(*f*) Bankruptcy Rules, r. 271 A (1).
(*g*) *Ibid.* (2).
(*h*) *Ibid.* (3).
(*i*) *Ibid.* (4).
(*j*) *Ibid.* (5).
(*k*) Infants' Relief Act, 1874 (37 & 38 Vict. c. 62), s. 1. See title INFANTS.
(*l*) *Ex parte Jones, Re Jones* (1881), 18 Ch. D. 109, and see *Ex parte Kibble, Re Onslow* (1875), 10 Ch. App. 373; *Re Raineys* (1880), 3 L. R. Ir. 459; *R.* v. *Wilson* (1880), 5 Q. B. D. 28. Under the old law infants had been held liable to bankruptcy, and had been made bankrupt (*Re Smedley* (1864), 10 L. T. 432).

SUB-SECT. 3. Persons subject to Bankruptcy Law.

petition (*m*). Though he can make a valid contract in respect of necessaries supplied to him (*n*), it has not been decided whether a debt incurred in respect of such a contract renders him liable to bankruptcy (*o*), but it is submitted that it does not on the ground that this is a matter of status (*p*). On the other hand, a debt fraudulently contracted by him during infancy may on equitable principles be provable against his estate if he becomes a bankrupt after full age (*q*).

An infant is not liable to bankruptcy in respect of debts contracted by a firm of which he is a partner (*r*).

Convicts.

13. A convicted felon is liable to bankruptcy on a debt incurred before conviction notwithstanding the fact that the judgment and resulting procedure in bankruptcy are subsequent to conviction (*s*). Though he is incapable of alienating or charging his property while a convict, the right to execution on judgments, whether obtained before or after conviction, is expressly reserved in the interests of his creditors (*t*).

Ambassadors.

14. An ambassador or a minister accredited by a foreign Government is exempt from local jurisdiction, and, even though a British subject, can claim privilege from bankruptcy law (*u*). Such privilege attaches to a *bonâ fide* member of the embassy if he is not a British subject, but not when his appointment has been obtained for the purpose of using such privilege to defeat creditors (*a*).

Corporations.

15. No corporation, or partnership or association, or company registered under the Companies Acts, is liable to bankruptcy proceedings (*b*).

Members of Parliament.

16. Members of either House of Parliament may be adjudicated bankrupt, privilege of Parliament being no defence to a petition in bankruptcy (*c*).

Partners.

17. Any two or more persons being partners, or any person carrying on business under a partnership name, may be proceeded

(*m*) *Ex parte Jones, Re Jones* (1881), 18 Ch. D. 109.

(*n*) See note (*k*), p. 11, *ante*.

(*o*) *Re Soltykoff, Ex parte Margrett*, [1891] 1 Q. B. 413. The *ratio decidendi* of this case was the fact that the infant could not be made liable on a bill of exchange even where given as payment for necessaries, the main question being expressly left undecided.

(*p*) See *Lovell and Christmas* v. *Beauchamp*, [1894] A. C. 607; *Re Beauchamp* (1895), 2 Mans. 151.

(*q*) *Ex parte Unity Joint Stock Mutual Banking Association, Re King* (1858), 3 De G. & J. 63.

(*r*) *Lovell and Christmas* v. *Beauchamp, supra*.

(*s*) *Ex parte Graves, Re Harris* (1881), 19 Ch. D. 1.

(*t*) Forfeiture Act, 1870 (33 & 34 Vict. c. 23), ss. 8, 27, and see title CRIMINAL LAW AND PROCEDURE.

(*u*) *Macartney* v. *Garbutt* (1890), 24 Q. B. D. 368. See also title ACTION, Vol. I., p. 20.

(*a*) *Re Cloete, Ex parte Cloete* (1891), 8 Morr. 195.

(*b*) Bankruptcy Act, 1883 (46 & 47 Vict. c. 52), s. 123. As to the winding up of companies, see title COMPANIES.

(*c*) Bankruptcy Act, 1883 (46 & 47 Vict. c. 52), s. 124. As to disqualification of members of either House of Parliament resulting on bankruptcy, see p. 88, *post*, and title PARLIAMENT.

against in bankruptcy in the name of the firm, but an order of the court may be made for disclosure of all the names of the partners (*d*). A receiving order made against a firm operates as a receiving order against each person who is a partner at the date of the order (*e*). On the other hand, an adjudication order must be made not against the firm in the firm name, but against each partner individually (*f*).

SUB-SECT. 3. Persons subject to Bankruptcy Law.

18. An undischarged bankrupt who after the date of his bankruptcy has contracted debts may be adjudicated bankrupt a second time (*g*). The court, however, will exercise a discretion in such a case, and will refuse a further receiving order where satisfied that there are no assets available for administration under the second bankruptcy (*h*).

Undischarged bankrupts.

SECT. 2.—*Acts of Bankruptcy.*

SUB-SECT. 1.—*In General.*

19. Acts of bankruptcy are defined by the Bankruptcy Acts (*i*), which in this respect must be strictly construed (*k*). They are of three kinds, namely, those which arise from dealings by a debtor with his property, those which consist of personal acts or defaults by him, and those which arise from the condition of his affairs showing him to be insolvent.

Classification.

An act of bankruptcy, the essence of which lies in the intention of the debtor at the time when he did the act, must be a personal act or default, and cannot be committed through an agent of the person sought to be made bankrupt (*l*). There are, however, some acts of bankruptcy which may be committed through an agent (*m*). An act of bankruptcy (*n*) unequivocally committed cannot be explained away by subsequent circumstances (*o*).

Personal act or default.

An available act of bankruptcy means any act of bankruptcy available for a bankruptcy petition at the date of the presentation of the petition on which the receiving order is made (*p*). If a disposition of a debtor's property, whether voluntary or involuntary, constitutes a completed available act of bankruptcy, the effect of

Available act of bankruptcy.

(*d*) Bankruptcy Act, 1883 (46 & 47 Vict. c. 52), s. 115.
(*e*) Bankruptcy Rules, r. 262.
(*f*) *Ibid.*, r. 264. See further, as to partners, pp. 28, 61, *post*.
(*g*) *Ex parte Watson, Re Roberts* (1879), 12 Ch. D. 380; *Morgan* v. *Knight* (1864), 15 C. B. (N. S.) 669; and see *Re Clark, Ex parte Beardmore*, [1894] 2 Q. B. 393.
(*h*) *Ex parte Betts, Re Betts*, [1897] 1 Q. B. 50.
(*i*) Bankruptcy Acts, 1883 and 1890 (46 & 47 Vict. c. 52, s. 4, and 53 & 54 Vict. c. 71, s. 1).
(*k*) *Ex parte Chinery, Re Chinery* (1884), 12 Q. B. D. 343, 346; *Dutton* v. *Morrison* (1810), 17 Ves. 194.
(*l*) *Ex parte Blain, Re Sawers* (1879), 12 Ch. D. 522.
(*m*) *E.g.*, notice of suspension of payment (*Re Lamb* (1887), 4 Morr. 25).
(*n*) For the different principles which govern voluntary and involuntary acts of bankruptcy, see *Ex parte Villars, Re Rogers* (1873), 9 Ch. App. 432, *per* Lord CAIRNS, at p. 442; and *Re Lawford and Lawrence, Ex parte the Trustee*, [1902] 2 K. B. 445, *per* WRIGHT, J., at p. 448.
(*o*) *Colkett* v. *Freeman* (1787), 2 Term Rep. 59.
(*p*) Bankruptcy Act, 1883 (46 & 47 Vict. c. 52), s. 168 (1).

SUB-SECT. 1. In General.

the debtor becoming bankrupt is to make the disposition void as against his creditors, and to bring back the property into his general assets for distribution amongst his creditors (*q*).

Definition of property.

As used in the Bankruptcy Acts the word "property" includes money, goods, things in action, land, and every description of property, whether real or personal, and whether situate in England or elsewhere; also obligations, easements, and every description of estate, interest and profit, present or future, vested or contingent, arising out of or incident to property thus defined (*r*).

SUB-SECT. 2.—*Assignment for Benefit of Creditors.*

Definition.

20. A debtor commits an act of bankruptcy if in England or elsewhere (*s*) he makes a conveyance or assignment of his property to a trustee or trustees for the benefit of his creditors generally (*a*). An assignment, however, by a debtor of his property for the benefit of one class of creditors only, such as his trade creditors, is not an act of bankruptcy as an assignment of property for the benefit of creditors generally, though it may amount to an act of bankruptcy as a fraudulent assignment (*b*).

Assignments within definition.

The conveyance or assignment must be one which operates according to English law, which a conveyance executed by a domiciled Englishman, although out of England, may do; but a conveyance or assignment of property executed by a foreigner out of England and operating according to foreign law cannot be an act of bankruptcy (*s*).

Assignment must be complete and of whole property.

21. A conveyance or assignment of property is not an act of bankruptcy unless it is in the strict legal sense an operative conveyance or assignment of the whole or substantially the whole of the debtor's property (*c*). Thus a deed purporting to be such a conveyance, if delivered as an escrow, is not an act of bankruptcy (*d*), nor is a mere declaration of trust or an agreement by the debtor to dispose of his property for the benefit of his creditors (*e*).

Proof of intention unnecessary.

Proof of an intention by the debtor to defeat or delay his creditors was never required to establish this act of bankruptcy, because the necessary effect of the conveyance or assignment is to defeat or delay his creditors and to prevent his property from

(*q*) See *Ex parte Villars, Re Rogers* (1873), 9 Ch. App. 432, *per* JAMES, L.J., at p. 445; and *Re Carl Hirth, Ex parte the Trustee*, [1899] 1 Q. B. 612, *per* LINDLEY, M.R., at p. 619.

(*r*) Bankruptcy Act, 1883 (46 & 47 Vict. c. 52), s. 168 (1).

(*s*) *Cooke* v. *Charles A. Vogeler Co.*, [1901] A. C. 102; *Ex parte Crispin, Re Crispin* (1873), 8 Ch. App. 374.

(*a*) Bankruptcy Act, 1883 (46 & 47 Vict. c. 52), s. 4 (1) (a). Such a disposition of property was, before being made an act of bankruptcy by statute, always regarded by the Courts as an act of bankruptcy, because it was a disposition which deprived a debtor's creditors of the benefit of the bankruptcy laws (*Bowker* v. *Burdekin* (1843), 11 M. & W. 128; *Stewart* v. *Moody* (1835), 1 Cr. M. & R. 777).

(*b*) *Re Phillips, Ex parte Barton*, [1900] 2 Q. B. 329.

(*c*) *Re Hughes, Ex parte Hughes*, [1893] 1 Q. B. 595. See also paragraph 30, *infra*.

(*d*) *Bowker* v. *Burdekin, supra*.

(*e*) *Re Spackman, Ex parte Foley* (1890), 24 Q. B. D. 728; *Re Hughes, Ex parte Hughes, supra*.

being administered in the manner contemplated by the provisions of the Bankruptcy Acts (*f*).

SUB-SECT. 2. Assignment for Benefit of Creditors.

An assignment executed, but only to be used in case of necessity (*g*), and an assignment containing a proviso that it is to be void in certain events (*h*) are acts of bankruptcy by the assignor. The absence of a proper stamp (*i*) or of registration under the Deeds of Arrangement Act, 1887 (*k*), or other imperfection in the execution of the instrument, does not prevent the execution of an assignment from constituting an act of bankruptcy.

Incomplete assignments.

22. A creditor who assents to, or is a party or privy to, or acquiesces in the conveyance or assignment cannot use it as an act of bankruptcy on which to make the debtor a bankrupt (*l*), unless his assent has been obtained by fraud (*m*). In order to preclude him from using a debtor's deed of assignment as an act of bankruptcy it is not necessary to prove an actual definite assent by him, if he has acquiesced in or submitted to the deed by intentionally taking advantage of it (*n*), or by his conduct (*o*). Delay in expressing dissent from the deed after knowledge of it may amount to acquiescence (*p*), unless the delay can be satisfactorily explained (*q*).

Assenting creditor.

SUB-SECT. 3.—*Fraudulent Assignment of Property.*

23. A debtor (*r*) commits an act of bankruptcy if in England or elsewhere (*s*) he makes a fraudulent conveyance, gift, delivery, or transfer of his property or of any part thereof (*t*).

Classification of fraudulent assignments.

(*f*) *Re Wood* (1872), 7 Ch. App. 302, 305; *Dutton* v. *Morrison* (1810), 17 Ves. 194; *Ponsford* v. *Walton* (1868), L. R. 3 C. P. 167; *Ex parte Wensley, Re Wensley* (1862), 1 De G. J. & S. 273. In the last-named case the principal part only of the property was assigned; and it was assumed that this would be sufficient to satisfy the words of the section "his property."

(*g*) *Turner* v. *Hardcastle* (1862), 11 C. B. (N. S.) 683.

(*h*) *Tappenden* v. *Burgess* (1803), 4 East, 230; *Dutton* v. *Morrison* (1810), 17 Ves. 194.

(*i*) *Ex parte Squire, Re Gouldwell* (1868), 4 Ch. App. 47; *Ponsford* v. *Walton, supra; Re Hollingshead, Ex parte Heapy* (1889), 58 L. J. (Q. B.) 297. See also p. 20, *post*.

(*k*) 50 & 51 Vict. c. 57, ss. 5, 17, p. 329, *post; Re Hollingshead, Ex parte Heapy, supra*.

(*l*) *Ex parte Alsop, Re Rees* (1860), 29 L. J. (BCY.) 7; *Re Stray, Ex parte Stray* (1867), 2 Ch. App. 374; *Re Thomas Hawley, Ex parte Ridgway* (1897), 4 Mans. 41. Acquiescence in the assignment does not prevent the creditor from petitioning on another act of bankruptcy consisting in non-compliance with a bankruptcy notice (*Re Mills, Ex parte Mills*, [1906] 1 K. B. 389, where the principles of *Re Stray, Ex parte Stray, supra*, were approved).

(*m*) *Re Tanenberg & Sons, Ex parte Perrier* (1889), 6 Morr. 49; *Dauglish* v. *Tennent* (1866), L. R. 2 Q. B. 49; *Ex parte Milner, Re Milner* (1885), 15 Q. B. D. 605 (secret preference of one creditor).

(*n*) *Re Michael, Ex parte Michael* (1891), 8 Morr. 305.

(*o*) *Re Adamson, Ex parte Viney* (1894), 2 Mans. 153 (assignment made in pursuance of an agreement with one creditor); *Re Woodroff, Ex parte Woodroff* (1897), 4 Mans. 46 (creditor supplying goods to the trustee of the deed).

(*p*) *Re Carr, Ex parte Jacobs* (1902), 85 L. T. 552.

(*q*) *Re Day, Ex parte Hammond* (1902), 86 L. T. 238.

(*r*) See p. 8, *ante*.

(*s*) See p. 6, *ante*.

(*t*) Bankruptcy Act, 1883 (46 & 47 Vict. c. 52), s. 4 (1) (b). The same principles as to the place where the property exists, and the conveyance is made,

SUB-SECT. 3. **Fraudulent Assignment of Property.**

For the purposes of bankruptcy law there are, broadly speaking, two classes of assignments which by reason of being considered to be fraudulent as against creditors of the assignor are acts of bankruptcy, namely, (1) assignments fraudulent at common law or under the statute 13 Eliz. c. 5 (*a*), and (2) assignments fraudulent under the Bankruptcy Acts (*b*). Any assignment which would be fraudulent under the statute of Elizabeth (*a*) is an act of bankruptcy under the Bankruptcy Acts, for to render an assignment void under the statute of Elizabeth it is necessary to prove or infer an actual intention to defraud creditors, whether such assignment is voluntary or for valuable consideration (*c*).

Assignments fraudulent in bankruptcy.

24. Assignments of the second class may conveniently be divided into two kinds—firstly, assignments of the whole or substantially the whole, and, secondly, assignments of part, of the debtor's property.

Fraudulent intention.

To render an assignment fraudulent under the bankruptcy laws there must be a fraudulent intention on the part of the debtor (*d*). Moral fraud is not necessary, but there must be fraud upon creditors (*e*), that is to say, a design to prevent the distribution of the insolvent debtor's property in accordance with the bankruptcy laws (*f*). A fraudulent intention to defeat or delay creditors is generally inferred from surrounding circumstances, and need not be specifically proved (*g*) even where the transaction is for good consideration (*h*).

Assignments as security for past debts.

25. An assignment by a debtor of the whole or substantially the whole of his property in consideration of a past debt is an act of bankruptcy within this provision of the law (*i*), whatever the

apply as in the case of an assignment for the benefit of creditors, see note (*s*), p. 14, *ante*.

(*a*) For assignments within the statute 13 Eliz. c. 5, see title FRAUDULENT AND VOLUNTARY CONVEYANCES. See also *Twyne's Case* (1601), 1 Smith, L. C., 11th ed., p. 1.

(*b*) See also p. 14, *ante*, and p. 20, *post*.

(*c*) See further the notes to *Twyne's Case*, *supra*, and the judgments in *Re Cranston, Ex parte Cranston* (1891), 9 Morr. 160.

(*d*) *Re Spackman, Ex parte Foley* (1890), 24 Q. B. D. 728, at p. 737.

(*e*) See *Re Wood* (1872), 7 Ch. App. 302. Assignments amounting to fraudulent preferences are now acts of bankruptcy by statute. See p. 20, *post*.

(*f*) *Dutton* v. *Morrison* (1810), 17 Ves. 194; *Ex parte Chaplin, Re Sinclair* (1884), 26 Ch. D. 319.

(*g*) *Re Wood, supra*. The words "with intent to defeat or delay creditors," which were in the Bankruptcy Acts down to the Act of 1869, have been omitted in the Bankruptcy Acts now in force. It would seem that where the assignment is for a consideration which is wholly past, the presumption of fraud is immediately raised. Where, however, it is for a present consideration, proof of fraudulent intention is necessary, whether as a matter of fact or as inferred from surrounding circumstances (*Re Wood, supra; Re Colemere* (1865), 1 Ch. App. 128).

(*h*) *Re Sharp, Ex parte Gundry and Johnston* (1900), 83 L. T. 416.

(*i*) *Worseley* v. *Demattos and Slader* (1758), 1 Burr. 467; *Siebert* v. *Spooner* (1836), 1 M. & W. 714; *Ex parte Ellis, Re Ellis* (1876), 2 Ch. D. 797; and see *Ex parte Chaplin, Re Sinclair* (1884), 26 Ch. D. 319; *Woodhouse* v. *Murray* (1868), L. R. 4 Q. B. 27; *Graham* v. *Chapman* (1852), 12 C. B. 85; *Lomax* v. *Buxton* (1871), L. R. 6 C. P. 107; *Bittlestone* v. *Cooke* (1856), 6 E. & B. 296; *Hutton* v. *Cruttwell* (1852), 1 E. & B. 15; and *Re Phillips, Ex parte Barton,*

motives of the parties may have been; this is not so, however, when the debt was an advance made upon the promise of the debtor to give security for it at a subsequent time; but the security must be a valid one and the promise absolute (*j*). The onus of proving the existence and *bona fides* of such a prior agreement is upon the person who sets it up (*k*). The giving of the security by the debtor must not in such cases be postponed for the purpose of preserving his credit. Such a postponement is evidence of an intention to prefer the grantee to the prejudice of creditors (*l*).

Assignment of whole property.

Neither the sale nor the mortgage of the whole of his property is itself an act of bankruptcy, if it is made *bonâ fide* and for a present equivalent paid or rendered to him (*m*), which need not be of the same value as the property assigned or charged, nor equal in value to the existing debt (*n*). The party who seeks to treat such a transaction as an act of bankruptcy must show some fact from which fraud may be inferred (*o*). The mere fact alone that the effect of the assignment will be to stop the debtor's business does not make it an act of bankruptcy, although it is one of the circumstances from which an act of bankruptcy may be inferred (*p*). On the same principle the assignment of his business by an insolvent debtor to a "one-man" company will be held fraudulent (*q*), provided that from the circumstances of the assignment an intent to defeat or delay creditors may be inferred (*r*).

Assignments securing existing debts and further advances.

26. An assignment of the whole of a debtor's property partly to secure an existing debt and also in consideration of a further advance of money is not necessarily an act of bankruptcy (*s*). To

[1900] 2 Q. B. 329, *per* WRIGHT, J., at p. 331. As to partners, see *Ex parte Trevor, Re Burghardt* (1875), 1 Ch. D. 297; *Ex parte Snowball, Re Douglas* (1872), 7 Ch. App. 534; *Bowker* v. *Burdekin* (1843), 11 M. & W. 128.

(*j*) *Harris* v. *Rickett* (1859), 28 L. J. (Q. B.) 197; *Ex parte Izard, Re Cook* (1874), 9 Ch. App. 271; *Ex parte King, Re King* (1876), 2 Ch. D. 256.

(*k*) *Ex parte Kilner, Re Barker* (1879), 13 Ch. D. 245.

(*l*) *Ex parte Fisher, Re Ash* (1872), 7 Ch. App. 636; *Re Gibson, Ex parte Bolland* (1878), 8 Ch. D. 230; *Ex parte Burton, Re Tunstall* (1879), 13 Ch. D. 102. See also *Re Jackson, Ex parte Hall* (1877), 4 Ch. D. 682. As to delay in registration of a bill of sale under a colonial Act as affecting bankruptcy, see *W. Morris* v. *A. Morris*, [1895] A. C. 625. As to a second bill of sale over the same property, see *Ex parte Hill, Re Bird* (1883), 23 Ch. D. 695.

(*m*) *Rose* v. *Haycock* (1834), 1 Ad. & El. 460; *Pennell* v. *Reynolds* (1862), 11 C. B. (N. S.) 709; *Bittlestone* v. *Cooke* (1856), 6 E. & B. 296; *Young* v. *Waud* (1852), 8 Exch. 221; *Mercer* v. *Peterson* (1868), L. R. 3 Exch. 104, at p. 106.

(*n*) *Mercer* v. *Peterson* (1868), L. R. 3 Exch. 104; *Bittlestone* v. *Cooke* (1856), 6 E. & B. 296; *Lee* v. *Hart* (1856), 11 Exch. 880.

(*o*) *Rose* v. *Haycock, supra*.

(*p*) *Young* v. *Waud, supra*; and compare *Ex parte Bailey, Re Barrell* (1860), 3 De G. M. & G. 524.

(*q*) *Re Carl Hirth, Ex parte the Trustee*, [1899] 1 Q. B. 612; *Wheatley's Trustee* v. *H. Wheatley, Ltd.* (1901), 85 L. T. 491.

(*r*) *Re A. S. Harris, Ex parte the Trustee* (1906), 54 W. R. 460; and compare *Re Slobodinsky, Ex parte Moore*, [1903] 2 K. B. 517.

(*s*) *Allen* v. *Bonnett* (1870), 5 Ch. App. 577; *Ex parte Hauxwell, Re Hemingway* (1883), 23 Ch. D. 626; *Lomax* v. *Buxton* (1871), L. R. 6 C. P. 107; *The Thames* (1890), 63 L. T. 353; *Ex parte Wilkinson, Re Berry* (1882), 22 Ch. D. 788.

SUB-SECT. 3. **Fraudulent Assignment of Property.**

save such an assignment from being an act of bankruptcy, the advance must be made to enable the debtor to continue his business, and the lender must have reasonable grounds for knowing this; where the assignment is for the real purpose of securing an existing debt, and the advance is a device for concealing this fact, the assignment is an act of bankruptcy (*t*). If there is a further advance, it is not a question whether its amount is great or small, but whether there was a *bonâ fide* intention of carrying on the assignor's business (*u*). The mere fact that the advance is made at an oppressive rate of interest does not, in the absence of other circumstances suggesting fraud, make the assignment an act of bankruptcy (*a*).

There must be a *bonâ fide* agreement to make the advance (*b*). The agreement need not be technically binding if it consists of a *bonâ fide* promise (*c*), and so long as it is contemporaneous with the assignment may be a parol agreement (*d*).

Adequate consideration for assignment.

27. The consideration need not be paid to the debtor personally (*e*), and need not consist in a cash payment (*f*). It may consist in a release of the debtor's property from a charge already affecting it (*g*), or may be a sum paid to another creditor to release a previous bill of sale which he holds over the debtor's property (*h*). On the other hand, neither payment by the assignee to some creditors, even though honestly made (*i*), nor an agreement by him to pay creditors, is a sufficient consideration to prevent the assignment from being an act of bankruptcy (*k*).

Forbearance to enforce a judgment without a binding agreement not to do so is not a sufficient consideration to protect such an

(*t*) *Ex parte Johnson, Re Chapman* (1884), 26 Ch. D. 338; *Ex parte Greener, Re Vane* (1877), 46 L. J. (BCY.) 76; *Heath* v. *Cochrane* (1877), 46 L. J. (Q. B.) 727; and see *Ex parte Evans, Re Edwards* (1879), 39 L. T. 364; *Administrator-General of Jamaica* v. *Lascelles, De Mercado & Co., Re Rees' Bankruptcy*, [1894] A. C. 135.

(*u*) *Ex parte Ellis, Re Ellis* (1876), 2 Ch. D. 797, *per* MELLISH, L.J., at p. 798; and *Ex parte Chaplin, Re Sinclair* (1884), 26 Ch. D. 319, *per* COTTON, L.J., at p. 324. The smallness of a further advance may, however, if it is made upon the eve of bankruptcy, be strong evidence that the purpose thereof is to secure a past debt, and not to enable the debtor to continue his trade (*Ex parte Fisher, Re Ash* (1872), 7 Ch. App. 636).

(*a*) *Harrison* v. *Cohen* (1875), 32 L. T. 717.

(*b*) *Ex parte Dann, Re Parker* (1881), 17 Ch. D. 26.

(*c*) *Ex parte Wilkinson, Re Berry* (1882), 22 Ch. D. 788.

(*d*) *Ex parte Sheen, Re Winstanley* (1876), 1 Ch. D. 560; *Ex parte Hauxwell, Re Hemingway* (1883), 23 Ch. D. 626.

(*e*) See *Ex parte Reed and Steel, Re Tweddell* (1872), L. R. 14 Eq. 586, where a debtor who had accepted bills of exchange assigned all his property to the drawer for the amount of the bills and past debts in consideration of the drawer taking over the debtor's liability on the bills.

(*f*) *Ex parte Threlfall, Re Williamson* (1876), 46 L. J. (BCY.) 8, where a further supply of goods to the debtor was held sufficient.

(*g*) *Whitmore* v. *Claridge* (1863), 33 L. J. (Q. B.) 87.

(*h*) *Lomax* v. *Buxton* (1871), L. R. 6 C. P. 107; and see *Ex parte Jay, Re Morris* (1882), 45 L. T. 797.

(*i*) *Ex parte Gundry and Johnston, Re Sharp* (1900), 83 L. T. 416; and see *Ex parte Zwilchenbart, Re Marshall* (1844), 3 Mont. D. & De G. 671.

(*k*) *Ex parte Chaplin, Re Sinclair* (1884), 26 Ch. D. 319.

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assignment from being an act of bankruptcy (*l*), inasmuch as the creditors at large could have interfered and taken the proceeds of the judgment when enforced (*m*); and giving time to a debtor to pay will under no circumstances be a sufficient equivalent to protect the assignment (*n*).

After-acquired property may be included.

Where an existing debt and a present advance are secured by the assignment, the fact that after-acquired property is included in the assignment does not render it an act of bankruptcy, even where the after-acquired property is purchased by means of the advance (*o*).

What is whole of debtor's property.

28. The question whether or not the whole or substantially the whole of a debtor's property has been assigned is important. An assignment of part only of a debtor's property in consideration of a pre-existing debt is not necessarily an act of bankruptcy (*p*); but if the effect of the assignment is to place the bulk of the property out of the reach of the other creditors, it will be held to be an act of bankruptcy (*q*). In estimating whether or not the assignment comprises the whole of the debtor's property, the value of that part excepted must be taken into account (*r*); and in considering the nature of the exception the necessary effect of the assignment must be considered. Where its effect will be to delay creditors (*s*), or in the case of a trader will render him incapable of carrying on his business and practically produce insolvency, then the assignment, notwithstanding the exception, will be an act of bankruptcy (*t*). The onus of proving that such would be the effect of the assignment is upon the party who seeks to set it up as an act of bankruptcy (*a*).

The exception of a part of the debtor's property which could not pass to the trustee in bankruptcy is not an exception which will protect the assignment (*b*).

Assignment of part of property.

29. An assignment of part of a debtor's property when made with an intent which can from surrounding circumstances be inferred

(*l*) *Ex parte Cooper, Re Baum* (1878), 10 Ch. D. 313.

(*m*) *Woodhouse* v. *Murray* (1867), L. R. 2 Q. B. 634. See also *Ex parte Payne, Re Cross* (1879), 11 Ch. D. 539.

(*n*) *Ex parte Cooper, Re Baum, supra;* but compare *Philps* v. *Hornstedt* (1873), 1 Ex. D. 62, where there were special circumstances.

(*o*) *Ex parte Hauxwell, Re Hemingway* (1883), 23 Ch. D. 626, overruling *Graham* v. *Chapman* (1852), 12 C. B. 85, on this point. See, however, the Bills of Sale Act, 1882 (45 & 46 Vict. c. 43), ss. 4, 5, as to the inclusion of property, present or future, in a bill of sale, and title BILLS OF SALE.

(*p*) See paragraph 29, *infra.*

(*q*) *Wheatley's Trustee* v. *H. Wheatley, Ltd.* (1901), 85 L. T. 491; *Ex parte Foxley, Re Nurse* (1868), 3 Ch. App. 515, where the omission of book debts and furniture was held not a sufficient exception; and see *Ex parte Field, Re Marlow* (1879), 13 Ch. D. 106, n.; *Ex parte Bland, Re Murgatroyd* (1857), 6 De G. M. & G. 757.

(*r*) *Ex parte Burton, Re Tunstall* (1879), 13 Ch. D. 102; *Wheatley's Trustee* v. *H. Wheatley, Ltd., supra.*

(*s*) *Smith* v. *Cannan* (1853), 2 E. & B. 35, at p. 45.

(*t*) *Re Rayment, Ex parte Parkes* (1899), 6 Mans. 288; *Ex parte Bailey, Re Barrell* (1853), 3 De G. M. & G. 534; *Hale* v. *Allnutt* (1856), 18 C. B. 505; and see *Wheatley's Trustee* v. *H. Wheatley, Ltd., supra; Pennell* v. *Reynolds* (1861), 11 C. B. (N. S.) 709; *Young* v. *Fletcher* (1865), 3 H. & C. 732.

(*a*) *Wedge* v. *Newlyn* (1853), 4 B. & Ad. 831.

(*b*) *Ex parte Hawker, Re Keely* (1872), 7 Ch. App. 214.

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to be fraudulent will be an act of bankruptcy (*c*). An assignment of this nature usually constitutes a fraudulent preference of a particular creditor, which is itself an act of bankruptcy (*d*).

Imperfect deed.

30. A deed, though not perfectly executed, may constitute an act of bankruptcy where it is intended immediately and presently to operate so as to delay creditors (*e*). The absence of a proper stamp does not prevent the execution of a deed from constituting an act of bankruptcy or its admission in evidence as proof that such an act has been committed (*f*).

Extent of avoidance of assignment.

31. To render an assignment void as fraudulent in bankruptcy it must have been executed within three months next preceding the date of the presentation of a bankruptcy petition against the debtor, the three months being the period of relation back of the title of the trustee in bankruptcy; and such an assignment is only void as against creditors of the assignor, and not as between the parties (*g*).

SUB-SECT. 4.—*Assignment amounting to Fraudulent Preference.*

Fraudulent preference.

32. A debtor commits an act of bankruptcy if in England or elsewhere he makes any conveyance or transfer of his property or any part thereof, or creates any charge thereon which would under the Bankruptcy Act, 1883, or any other Act be void as a fraudulent preference if he were adjudged bankrupt (*h*). An alleged fraudulent preference is seldom put forward as an act of bankruptcy on which to found a bankruptcy petition, because, until there has been an adjudication and investigation of a debtor's affairs, the facts which constitute a fraudulent preference can seldom be proved.

SUB-SECT. 5.—*Departure or Absence of Debtor from Country, or Dwelling-house, or Place of Business.*

Evading creditors.

33. A debtor commits an act of bankruptcy if, with intent to defeat or delay his creditors, he does any of the following things, namely—departs out of England, or being out of England remains out of England, or departs from his dwelling-house, or otherwise absents himself, or begins to keep house (*i*), even if no actual delay to any creditor has been caused (*k*). The act of bankruptcy is complete

(*c*) This can be inferred from LINDLEY, L.J.'s judgment in *Re Carl Hirth, Ex parte the Trustee*, [1899] 1 Q. B. 612, at p. 619.

(*d*) See paragraph 32, *infra*. As to what constitutes a fraudulent preference, see p. 280, *post*.

(*e*) *Ex parte Snowball, Re Douglas* (1872), 7 Ch. App. 534, where one partner had executed a deed intended to be executed by two partners; *Bowker* v. *Burdekin* (1843), 11 M. & W. 128; *Botcherby* v. *Lancaster* (1834), 1 Ad. & El. 77.

(*f*) *Ex parte Squire, Re Gouldwell* (1868), 4 Ch. App. 47; *Ponsford* v. *Walton* (1861), L. R. 3 C. P. 167; *Re Hollingshead, Ex parte Heapy* (1889), 58 L. J. (Q. B.) 297.

(*g*) See the Bankruptcy Act, 1883 (46 & 47 Vict. c. 52), s. 43, and p. 279, *post*. See also *Curtis* v. *Price* (1806), 12 Ves. 89, at p. 102.

(*h*) Bankruptcy Act, 1883 (46 & 47 Vict. c. 52), s. 4 (1) (c). As to what is "property," see s. 168 of the same Act, and p. 14, *ante*. As to what amounts to a fraudulent preference under the Bankruptcy Act, see s. 48 of the Act, and pp. 279 *et seq.*, *post*.

(*i*) Bankruptcy Act, 1883 (46 & 47 Vict. c. 52), s. 4 (1) (d).

(*k*) *Rouch* v. *Great Western Rail. Co.* (1841), 4 Per. & Dav. 686; *Hallen* v. *Homer* (1823), 1 C. & P. 108.

SUB-SECT. 5. **Departure or Absence of Debtor.**

at the instant of departure, and is therefore not affected by subsequent circumstances (*l*). Usually the material facts on which this act of bankruptcy is established are that debts have matured or are maturing, and that the debtor departs and remains away without making provision to meet them (*m*).

Departure with intent.

The debtor's intention is material, and therefore he may go abroad for the purposes of his business, if he does so with an honest intention, without committing an act of bankruptcy, even though as a fact creditors are thereby delayed (*n*). On the other hand, if the necessary consequence of his departure is to cause delay to his creditors, a presumption of the intent to delay creditors is raised against him which he must rebut (*o*). On these principles the evidence of the intent need not be very strong (*p*), although the mere fact that he is at the time of departure in embarrassed circumstances is not in itself conclusive evidence (*q*). The presumption of intent does not arise in the case of a foreigner even if, during a temporary stay in England, he prepares to return home after the issue of process against him (*r*) or returns home after service of a writ upon him (*s*).

Remaining out of England.

34. A debtor who remains out of England with intent to defeat or delay creditors commits an act of bankruptcy notwithstanding the fact that his original departure may not have constituted such an act (*t*). In such a case it is assumed that he has his home or place of business in England, so that where an Englishman residing abroad who has contracted debts in England remains at his permanent residence abroad, no intent to defeat creditors is presumed against him (*a*).

Allegation and proof of intent.

The debtor's intent must be absolute, and not merely conditional upon the happening of a certain event (*b*), and it is essential that in a petition founded on this act of bankruptcy the intention to defeat and delay creditors should be alleged (*c*), and also that it

(*l*) *Ex parte Gardner* (1812), 1 Ves. & B. 45 (subsequent residence with the petitioning creditor).

(*m*) *Ex parte Coates, Re Skelton* (1877), 5 Ch. D. 979, *per* BACON, C.J., at p. 980.

(*n*) *Warner* v. *Barber* (1816), Holt (N. P.), 175; *Ex parte Mutrie* (1800), 5 Ves. 576; and see *Windham* v. *Paterson* (1815), 2 Rose, 466.

(*o*) *Ramsbottom* v. *Lewis* (1808), 1 Camp. 279; *Ex parte Goater, Re Finney* (1874), 30 L. T. 620; *Williams* v. *Nunn* (1809), 1 Taunt. 270; and see *Ex parte Rhodes, Re Wood* (1841), 5 Jur. 580, where there was absence for three years and consequent delay; *Ex parte Kilner, Re Bryant* (1837), 3 Mont. & A. 722, where the debtor left a power of attorney, but no means to pay his debts.

(*p*) *Rawson* v. *Haigh* (1824), 9 Moore (C. P.) 217.

(*q*) *Ex parte Osborne, Re Parr* (1813), 1 Rose, 387.

(*r*) *Ex parte Gutierrez, Re Gutierrez* (1879), 11 Ch. D. 298.

(*s*) *Ex parte Crispin, Re Crispin* (1873), 8 Ch. App. 374.

(*t*) *Ex parte Bunny, Re Bunny* (1857), 1 De G. & J. 309. A debtor who was allowed by his creditors to remain in America to realise his assets, but who refused to communicate with them or to accept service of a writ, was held to commit an act of bankruptcy (*Ex parte Campbell, Re Campbell* (1887), 4 Morr. 198).

(*a*) *Ex parte Brandon, Re Trench* (1884), 25 Ch. D. 500.

(*b*) *Fisher* v. *Boucher* (1830), 10 B. & C. 705.

(*c*) *Ex parte Coates, Re Skelton* (1877), 5 Ch. D. 979. An omission of the allegation can be rectified by amendment of the petition before adjudication (*Re Fiddian, Squire & Co., Ex parte Fiddian, Squire & Co.* (1892), 9 Morr. 95).

SUB-SECT. 5. Departure or Absence of Debtor.

should be established that the debtor is alive and in some place other than his dwelling-house (*d*)

Absence from dwelling-house or place of business.

35. The absence of the debtor must be an absence from his dwelling-house or place of business or from some particular creditor (*e*), and must be brought about with an absolute intention to defeat or delay creditors (*f*), which in every case must be clearly proved (*g*). The mere failure of the debtor to keep an appointment with a creditor is not in itself an act of bankruptcy in the absence of any such intent (*h*). The debtor may commit an act of bankruptcy without physical absence if he adopts an assumed name for purposes of concealment (*i*). Subject to the principles stated above, the debtor's intention and the absence which are sufficient to constitute an act of bankruptcy are matters of fact to be decided upon the circumstances of each particular case (*k*).

Keeping house.

36. The phrase "beginning to keep house" imports a refusal or denial on the part of the debtor to see creditors with the object of delaying them, and therefore a general order to be denied to everyone constitutes an act of bankruptcy, notwithstanding the fact that no particular creditor is thereby denied (*l*). The intention of the debtor must be clear (*m*), and accordingly a denial to a creditor not specifically ordered by him is not an act of bankruptcy, even if subsequently approved by him (*n*).

(*d*) *Ex parte Grisel, Re Stanger* (1882), 22 Ch. D. 436. As to the sufficiency of such proof, see *Re Lewis, Ex parte Becker* (1893), 10 Morr. 141.

(*e*) *Bernasconi* v. *Farebrother* (1830), 10 B. & C. 549; and see *Gimmingham* v. *Laing* (1816), 6 Taunt. 532; *Russell* v. *Bell* (1842), 10 M. & W. 340.

(*f*) *Fisher* v. *Boucher* (1830), 10 B. & C. 705.

(*g*) *Ex parte Lopez, Re Brelaz* (1871), 6 Ch. App. 894; and see *Re Worsley*, [1901] 1 Q. B. 309.

(*h*) *Ex parte Meyer, Re Stephany* (1871), 7 Ch. App. 188, where the debtor was subsequently found at his place of business. See also *Key* v. *Shaw* (1832), 1 Moo. & S. 462.

(*i*) Such conduct constitutes a continuing act of bankruptcy (*Re Alderson, Ex parte Jackson*, [1895] 1 Q. B. 183).

(*k*) *Warner* v. *Barber* (1816), Holt (N. P.), 175 (departure to avoid arrest); *Ex parte Bamford* (1808), 15 Ves. 449 (even though the debtor's apprehension of such arrest was groundless); *Re Woolstenholme, Ex parte Foster & Co.* (1887), 4 Morr. 258; *Re Baker, Ex parte Baker* (1887), 5 Morr. 5. The following cases are illustrations of the above principles: *Re McKeand, Ex parte McKeand* (1889), 6 Morr. 240 (departure leaving dishonoured promissory note); *Holroyd* v. *Whitehead* (1814), 3 Camp. 530 (departure owing to domestic dissensions and no provision for business arrangements or debts); *Hobson* v. *Brown* (1853), 1 Jur. 920 (departure in debt and removal of tools and furniture); *W. Spencer* v. *Billing* (1814), 3 Camp. 310, at p. 314 (departure of partners from place of business and removal of books); *Chenoweth* v. *Hay* (1813), 1 M. & S. 676 (concealment in a back room upon a false pretext); *Bramwell* v. *Lucas* (1824), 2 B. & C. 745 (absence from meeting of creditors in fear of arrest); *Ex parte Beer, Re Beer* (1841), 1 Mont. D. & De G. 390 (non-attendance at creditors' meeting). In each of these cases the debtor's action was held to constitute an act of bankruptcy. In *Ex parte Addison, Re Hooper* (1849), 3 De G. & Sm. 580, a direction by the debtor after dissolution of partnership to address his letters to a particular post office was held to be no act of bankruptcy.

(*l*) *Lloyd* v. *Heathcote* (1820), 5 Moore (C. P.) 129; *Harvey* v. *Ramsbottom* (1822), 1 B. & C. 55; *Richardson* v. *Pratt* (1885), 52 L. T. 614.

(*m*) *Fisher* v. *Boucher* (1830), 10 B. & C. 705.

(*n*) *Ex parte Foster* (1810), 17 Ves. 414.

SUB-SECT. 5. Departure or Absence of Debtor.

The debtor's intention can be inferred from surrounding circumstances, and therefore a debtor who withdraws to a retired part of his house to avoid personal application for payment (*o*), or a banker who closes his bank against customers (*p*), or a trader who shuts up his shop and leaves home without directions or an address at which communications may be sent to him (*q*), commits an act of bankruptcy. The inference of intent can, however, be rebutted by evidence of the fact that the creditor called at an unreasonable hour (*r*) or by other evidence satisfactorily explaining the debtor's conduct in apparently avoiding a meeting with him (*s*). The denial must be to a creditor (*t*) or to a person substantially in the position of a creditor (*a*). A creditor has a right to call upon his debtor at the place where the latter may probably be found, and need not necessarily call at his place of business (*b*).

Inference of intent.

SUB-SECT. 6.—*Execution levied by Seizure and Sale.*

37. A debtor commits an act of bankruptcy if execution against him has been levied by seizure of his goods under process in an action in any court, or in any civil proceeding in the High Court, and the goods have been either sold or held by the sheriff for twenty-one days (*c*), exclusive of the day on which the seizure was made (*d*). Where, however, an interpleader summons has been taken out in regard to the goods seized, the time elapsing between the date at which such summons is taken out and the date at which the sheriff is ordered to withdraw, or any interpleader issue ordered thereon is finally disposed of, is not taken into account in calculating the period of twenty-one days (*e*).

Execution.

This act of bankruptcy is not committed until after the completion either of the sale or the holding by the sheriff for the requisite period (*f*). The holding by the sheriff and non-payment of the amount of the levy constitute an act of bankruptcy which

When act complete.

(*o*) *Dudley* v. *Vaughan* (1807), 1 Camp. 271, and see *Key* v. *Shaw* (1832), 1 Moo. & S. 462.

(*p*) *Cumming* v. *Bailey* (1830), 6 Bing. 363.

(*q*) *Ex parte Austen, Re Austen* (1837), 2 Deac. 533.

(*r*) *Ex parte Preston, Re Preston* (1813), 2 Rose, 21 (creditor calling on Sunday); *Hughes* v. *Gilman* (1825), 2 C. & P. 32 (creditor calling at a late hour).

(*s*) *Ex parte Curtis, Re Curtis* (1893), 9 T. L. R. 387; *Stafford* v. *Clark* (1824), 1 C. & P. 24.

(*t*) *Jameson* v. *Eamer* (1795), 1 Esp. 381.

(*a*) *Ex parte Bamford* (1809), 15 Ves. 449 (authorised servant of creditor). See also *Sanderson* v. *Laferest* (1823), 3 C. & P. 46 (denial to tax collector); *Lloyd* v. *Heathcote* (1820), 5 Moore (C. P.) 129 (denial to rate collector); in both these cases such denials were held acts of bankruptcy. A creditor calling to buy goods to cover the amount of his debt is a creditor in this sense if the debtor knows that his object is to obtain payment in this way (*Ex parte Harris* (1814), 2 Rose, 67), but not so if the debtor is ignorant of this fact (*Ex parte White* (1814), 3 Ves. & B. 128).

(*b*) *Park* v. *Prosser* (1824), 1 C. & P. 176 (lodgings); *Curteis* v. *Willes* (1824), 1 C. & P. 211 (house of debtor's friend).

(*c*) Bankruptcy Act, 1890 (53 & 54 Vict. c. 71), s. 1.

(*d*) *Re North, Ex parte Hasluck*, [1895] 2 Q. B. 264.

(*e*) Bankruptcy Act, 1890 (53 & 54 Vict. c. 71), s. 1.

(*f*) *Ex parte Villars, Re Rogers* (1874), 9 Ch. App. 432, which, although decided upon the Bankruptcy Act of 1869 (32 & 33 Vict. c. 71), seems still to be an authority on this point. As to the relation back of the trustee's title, see p. 181, *post*.

SUB-SECT. 6. Execution levied by Seizure and Sale.

defeats the title of the execution creditor as against the trustee in bankruptcy (*g*). At the same time the holding by the sheriff for the requisite period is a single, and not a continuing, act; and therefore any petition based upon it must be presented within three months after the completion of such period, and the fact that he continues in possession beyond the twenty-one days cannot be relied on as a further act of bankruptcy (*h*).

Sale.

It appears that the sale need not be by the sheriff. A fraudulent sale to the execution creditor after seizure in consideration of the withdrawal of the execution is in itself an act of bankruptcy, notwithstanding the fact that the sheriff does not conduct the sale (*i*). Payment, however, before seizure to the sheriff's officer with the assent of creditors, to prevent seizure, does not constitute an act of bankruptcy (*k*).

The term "civil proceeding in the High Court" includes an application for leave to enforce an award in the same manner as a judgment under sect. 12 of the Arbitration Act, 1889 (*l*), and therefore a seizure and a sale following upon such an order constitute an act of bankruptcy (*m*).

SUB-SECT. 7.—*Declaration of Insolvency and Debtor's Petition.*

Declaration of insolvency or debtor's petition.

38. A debtor commits an act of bankruptcy if he files in the court a declaration of his inability to pay his debts or presents a bankruptcy petition against himself (*n*). A declaration of inability to pay debts must be in a special form, dated, signed, and witnessed, and the witness must be a solicitor, or justice of the peace, or an official receiver, or registrar of the court (*o*). The filing of such a declaration is complete when the document is delivered by a properly authorised person to the proper officer at the proper office with the intent that it should be filed or placed upon record (*p*).

SUB-SECT. 8.—*Receiving Order made on Judgment Summons.*

Judgment summons.

39. If a judgment debtor is summoned before a judge under the Debtors Act, 1869 (*q*), for non-payment of the judgment debt, and a receiving order is made against him instead of an order committing

(*g*) *Figg* v. *Moore Brothers*, [1894] 2 Q. B. 690; *Trustee of John Burn-Burns* v. *Brown*, [1895] 1 Q. B. 324. See further as to the duties of the sheriff and effect of bankruptcy on executions generally, pp. 271 *et seq.*, *post*.

(*h*) *Re Beeston*, [1899] 1 Q. B. 626; *Re Hurley* (1893), 10 Morr. 120.

(*i*) *Ex parte Pearson*, *Re Mortimer* (1873), 8 Ch. App. 667, where JAMES, L.J., held such a transaction to be an act of bankruptcy as constituting a seizure and sale under the corresponding enactment in the Bankruptcy Act, 1869 (32 & 33 Vict. 71), while MELLISH, L.J., based his judgment on the broader ground that such a sale was a fraud on the bankruptcy laws.

(*k*) *Ex parte Brooke*, *Re Hassall* (1874), 9 Ch. App. 301.

(*l*) 52 & 53 Vict. c. 49. See title ARBITRATION, Vol. I., p. 473.

(*m*) *Ex parte Caucasian Trading Corporation, Ltd.*, [1896] 1 Q. B. 368.

(*n*) Bankruptcy Act, 1883 (46 & 47 Vict. c. 52), s. 4 (1) (f). As to a petition by the debtor, which is here made an act of bankruptcy in itself, see p. 46, *post*. The filing of a declaration of inability to pay debts is hardly ever in practice resorted to.

(*o*) Bankruptcy Rules, r. 135; *ibid.*, Appendix, Forms, No. 3.

(*p*) *Ransford* v. *Maule* (1873), L. R. 8 C. P. 672.

(*q*) 32 & 33 Vict. c. 62, s. 5.

him to prison, he is deemed to have committed an act of bankruptcy at the time when the order is made (*r*). This is so notwithstanding that the debtor is a foreigner who is not domiciled in England, and who is not chargeable with any other act of bankruptcy committed in England (*s*).

SUB-SECT. 8. Receiving Order on Judgment Summons.

SUB-SECT. 9.—*Non-compliance with Bankruptcy Notice.*

Bankruptcy notice.

40. A debtor (*t*) commits an act of bankruptcy if a creditor has obtained a final judgment against him for any amount, and, execution thereof not having been stayed, has served on him in England, or, by leave of the court, elsewhere, a bankruptcy notice under the Bankruptcy Act, 1883 (*a*), requiring him to pay the judgment debt in accordance with the terms of the judgment, or to secure or compound for it to the satisfaction of the creditor or the court, and he does not, within seven days after service of the notice, in case the service is effected in England, or in case the service is effected elsewhere, then within the time limited in that behalf by the order giving leave to effect the service, either comply with the requirements of the notice, or satisfy the court that he has a counterclaim set-off or cross demand which equals or exceeds the amount of the judgment debt, and which he could not set up in the action in which the judgment was obtained (*b*). The words of the enactment creating this act of bankruptcy are construed and applied in their strictly technical sense (*c*).

Who can serve bankruptcy notice as "creditor."

Executor or trustee in bankruptcy.

41. The term "creditor" includes a person who has obtained judgment in respect of a tort as well as of a debt (*d*); and any person who is for the time being entitled to enforce a final judgment is deemed a creditor who has obtained a final judgment for the purpose of giving him a right to issue a bankruptcy notice (*e*). The judgment creditor must be in a position to issue execution on his judgment (*f*), and therefore the executor of a creditor who has obtained final judgment cannot issue a bankruptcy notice founded on it without having obtained leave of the court (*g*) to issue execution (*h*). For the same reason the trustee in bankruptcy of the property of a judgment creditor, although made a party to the action in which the judgment was obtained, must obtain leave to issue execution before he can issue a bankruptcy notice (*i*).

(*r*) Bankruptcy Act, 1883 (46 & 47 Vict. c. 52), s. 103 (5); see p. 344, *post*.
(*s*) See p. 9, *ante*.
(*t*) Other than a married woman. See p. 9, *ante*, and p. 27, *post*.
(*a*) 46 & 47 Vict. c. 52.
(*b*) Bankruptcy Act, 1883 (46 & 47 Vict. c. 52), s. 4 (1) (g). The counterclaim must be due in the same right, so that a claim against executors as such cannot be set up against a judgment obtained by them personally (*Re Molesworth* (1907), 51 Sol. Jo. 653).
(*c*) *Ex parte Chinery, Re Chinery* (1884), 12 Q. B. D. 342, *per* BOWEN, L.J., at p. 346; *Re a Bankruptcy Notice*, [1907] 1 K. B. 478.
(*d*) *Ex parte Moore, Re Faithfull* (1885), 14 Q. B. D. 627.
(*e*) Bankruptcy Act, 1890 (53 & 54 Vict. c. 71), s. 1.
(*f*) For this see generally title EXECUTION.
(*g*) This leave is obtained under R. S. C. Ord. 42, r. 23. See titles EXECUTORS AND ADMINISTRATORS; EXECUTION.
(*h*) *Ex parte Woodall, Re Woodall* (1884), 13 Q. B. D. 479. See also *Ex parte Ide, Re Ide* (1886), 17 Q. B. D. 755.
(*i*) *Re Clements, Ex parte Clements*, [1901] 1 Q. B. 260.

SUB-SECT. 9. **Non-compliance with Bankruptcy Notice.**

A trustee who has recovered judgment for a debt due to the trust estate can issue a bankruptcy notice on the judgment, but may have to join the *cestui que trust* in any bankruptcy petition founded on the act of bankruptcy committed by non-compliance with the notice (*k*).

Trustee. Other persons.

The term "creditor" also includes a judgment creditor who has made an equitable assignment of the judgment debt (*l*), but does not include a petitioner who has obtained damages in a divorce suit against a co-respondent (*m*) nor the plaintiff in a probate action in which the defendant is ordered to pay to the plaintiff's solicitor the amount of the plaintiff's costs (*n*).

Company.

A company can issue a bankruptcy notice, and when it is in liquidation the notice should be in the name of the company, and not in the name of the liquidator (*o*).

Meaning of "final judgment."

42. A final judgment means a judgment obtained in an action by which a previously existing liability of the defendant to the plaintiff is ascertained or established (*p*). The final judgment must have been obtained in England; and therefore a bankruptcy notice cannot be founded upon a judgment of the Court of Session in Scotland, notwithstanding that the judgment has been registered in England under the Judgments Extension Act, 1868 (*q*).

Orders for payment, when not included.

To constitute an order of the court a final judgment there should be a proper *litis contestatio* and a final adjudication of it between the parties in an action (*r*). The words therefore do not include an order which by statute or rules of court is enforceable as a judgment unless it satisfies the foregoing definition. They do not, for example, include a garnishee order absolute (*s*), or an order for payment of alimony *pendente lite* (*t*), or an order against a co-respondent to pay the petitioner's costs in a divorce suit (*a*), or an order for payment of costs by the plaintiff after the dismissal of an action for want of prosecution (*b*), or a balance order made on a contributory in the winding-up of a company (*c*), or an order for payment of the costs of a bankruptcy motion to set aside a deed of assignment (*d*), or an order made on a petition to revoke a patent (*e*), or a consent order by a defendant on

(*k*) *Ex parte Dearle, Re Hastings* (1884), 14 Q. B. D. 184.
(*l*) *Re Palmer, Ex parte Brims*, [1898] 1 Q. B. 419.
(*m*) *Ex parte Fryer, Re Fryer* (1886), 17 Q. B. D. 718; *Re O'Gorman, Ex parte Bate*, [1899] 2 Q. B. 62.
(*n*) *Re Arkell, Ex parte Arkell* (1889), 6 Morr. 182.
(*o*) *Re Winterbottom, Ex parte Winterbottom* (1886), 18 Q. B. D. 446; and see *Re Bassett, Ex parte Lewis*, [1896] 1 Q. B. 219; *Re Murietta, Ex parte South American and Mexican Co., Ltd.* (1896), 3 Mans. 35.
(*p*) *Ex parte Chinery, Re Chinery* (1884), 12 Q. B. D. 342, *per* COTTON, L.J., at p. 345.
(*q*) 31 & 32 Vict. c. 54, ss. 3, 4; *Re a Bankruptcy Notice*, [1898] 1 Q. B. 383. See title JUDGMENTS AND ORDERS.
(*r*) *Re Riddell, Ex parte Earl of Strathmore* (1888), 20 Q. B. D. 512, *per* Lord ESHER, M.R., at p. 514.
(*s*) *Ex parte Chinery, Re Chinery, supra.*
(*t*) *Re Henderson, Ex parte Henderson* (1888), 20 Q. B. D. 569.
(*a*) *Re Binstead, Ex parte Dale*, [1893] 1 Q. B. 199.
(*b*) *Re Riddell, Ex parte Earl of Strathmore, supra.*
(*c*) *Ex parte Whinney, Re Sanders* (1884), 13 Q. B. D. 476; *Ex parte Grinwade, Re Tennent* (1886), 17 Q. B. D. 357.
(*d*) *Re a Bankruptcy Notice, Ex parte Official Receiver*, [1895] 1 Q. B. 609.
(*e*) *Re Owen, Ex parte Peters* (1900), 8 Mans. 24.

SUB-SECT. 9. Non-compliance with Bankruptcy Notice.

stay of proceedings to pay taxed costs by a certain date (*f*), or a judgment for costs to be taxed in which the amount of the taxed costs is not filled up (*g*), or an order to enforce an award in an arbitration by entering judgment in accordance therewith (*h*).

Orders for payment, when included.

On the other hand, an order for the payment of costs which forms part of a final judgment will support a bankruptcy notice; for such a judgment cannot be divided for the purpose of determining this question (*i*), and on the same principle an order made in an action against two trustees directing that one should indemnify the other against the costs of the action is a final judgment (*k*). So a judgment on a writ specially indorsed (*l*) and a judgment by default obtained in an action brought upon an interlocutory order to recover payment of costs of an appeal thereby ordered to be paid are both judgments on which a bankruptcy notice can be founded (*m*). A judgment in pursuance of a judge's order made by consent will support a bankruptcy notice although such judgment has not been filed in accordance with the provisions of the Debtors Act, 1869 (*n*).

An order for the payment of money against directors, officers and promoters of companies on a misfeasance summons (*o*) is deemed a final judgment for the purposes of a bankruptcy notice (*p*).

Against whom notice may be issued.

43. Subject to the following exceptions a bankruptcy notice can be issued against any debtor.

Married woman.

A bankruptcy notice cannot be issued against a married woman founded on a judgment obtained against her separate estate (*q*),

(*f*) *Ex parte Schmitz, Re Cohen* (1884), 12 Q. B. D. 509.

(*g*) *Re Crump, Ex parte Crump* (1891), 8 Morr. 174.

(*h*) *Re a Bankruptcy Notice*, [1907] 1 K. B. 478, holding that such an order cannot turn an award into a judgment for the purposes of a bankruptcy notice, and that an application for a bankruptcy notice is not a method of enforcing an award under s. 12 of the Arbitration Act, 1889 (52 & 53 Vict. c. 49), and that such a judgment is bad on the face of it for want of jurisdiction. See further title ARBITRATION, Vol. I., p. 473.

(*i*) *Ex parte Moore, Re Faithfull* (1885), 14 Q. B. D. 627, where the main remedy provided by the judgment, namely an inquiry as to damages, had not been proceeded with. See also *Re Alexander, Ex parte Alexander*, [1892] 1 Q. B. 216, where the judgment was for dissolution of partnership, an account and inquiry as to property, and an order for the payment of taxed costs with subsequent costs reserved, the bankruptcy notice being only founded on the order for payment of taxed costs.

(*k*) *Re Poole, Ex parte Twisaday and Milne* (1890), 7 Morr. 222.

(*l*) *Re a Debtor, Ex parte the Debtor*, [1903] W. N. 6. See R. S. C. Ord. 3, r. 6; Ord. 14; and see title PRACTICE AND PROCEDURE.

(*m*) *Re Boyd, Ex parte McDermott*, [1895] 1 Q. B. 611.

(*n*) Debtors Act, 1869 (32 & 33 Vict. c. 62), s. 27; *Re Russell, Ex parte Russell* (1888), 5 Morr. 258; *Gowan* v. *Wright* (1887), 18 Q. B. D. 201.

(*o*) Companies (Winding-up) Act, 1890 (53 & 54 Vict. c. 63), s. 10. See title COMPANIES.

(*p*) Companies (Winding-up) Act, 1893 (56 & 57 Vict. c. 58), s. 1.

(*q*) *Re Lynes, Ex parte M. Lester & Co.*, [1893] 2 Q. B. 113. This case practically decides that in no circumstances can a bankruptcy notice issue against a married woman, since separate trading is a condition precedent to her bankruptcy, and any judgment recovered against her would be as against her separate estate in the form prescribed in the case of *Scott* v. *Morley* (1887), 20 Q. B. D. 120; a bankruptcy notice must require payment personally, and thus it is impossible to frame a notice requiring the married woman, against whom such a judgment has been obtained, to pay the amount in accordance with the terms of the judgment. See also *Re Gardiner, Ex parte Coulson* (1887), 20 Q. B. D. 249.

SUB-SECT. 9. Non-compliance with Bankruptcy Notice.

even though she carries on a trade separately from her husband. Neither the death of her husband after the date of the judgment against her (*r*), nor the fact that a judgment has been obtained against her in the firm name under which she trades separately, renders her personally liable to pay the judgment debt in such a way that a bankruptcy notice can be founded on the judgment (*s*).

Infants. A bankruptcy notice cannot be issued against an infant (*t*) nor against an infant partner of a firm against which judgment has been obtained (*u*).

Foreigners. A foreigner resident abroad cannot be served with a bankruptcy notice out of the jurisdiction (*a*), but such a notice may be served on him, if he come temporarily within the jurisdiction of the court (*b*).

Partners. In the case of partners a bankruptcy notice may be issued against the firm in the firm name (*c*) notwithstanding that the judgment on which it is founded has been obtained after dissolution of the partnership (*d*).

Joint debtor. A bankruptcy notice may be issued against one of several debtors against whom judgment has been obtained jointly (*e*).

Effect of stay of execution.

44. Generally speaking a stay of execution prevents the issue of a bankruptcy notice.

Execution is for this purpose considered to be stayed if, at the date of the issue of the notice, from the circumstances of the case or the events which have arisen, the judgment creditor is not entitled to issue immediate execution on the judgment (*f*).

Interpleader. The issue of an interpleader summons (*g*) or the making of an interpleader order under which the claimant pays the whole amount of the judgment debt into court, followed by a withdrawal by the sheriff, prevents the issue of a bankruptcy notice (*h*). But where an interpleader order only affects a small part of the goods taken in execution, a bankruptcy notice issued for the whole amount of the judgment debt, without allowing for the value of the goods subject to the interpleader order, is not bad, but may be amended as containing only a formal defect (*i*). A claim by a third party to goods

(*r*) *Re Hewett, Ex parte Levene*, [1895] 1 Q. B. 328.

(*s*) *Re Frances Handford & Co., Ex parte Frances Handford*, [1899] 1 Q. B. 566.

(*t*) *Re Beauchamp Brothers, Ex parte G. W. Beauchamp*, [1894] 1 Q. B. 1. See also pp. 11, 12, *ante*.

(*u*) *Lovell and Christmas* v. *Beauchamp*, [1894] A. C. 607.

(*a*) *Re Pearson, Ex parte Pearson*, [1892] 2 Q. B. 263. See also paragraph 9, *ante*.

(*b*) *Re Clark, Ex parte Beyer, Peacock & Co., Ltd.*, [1896] 2 Q. B. 476

(*c*) Bankruptcy Act, 1883 (46 & 47 Vict. c. 52), s. 115. See also paragraph 17, *ante*.

(*d*) *Re Wenham, Ex parte Battams*, [1900] 2 Q. B. 698.

(*e*) *Re Low, Ex parte Gibson*, [1895] 1 Q. B. 734.

(*f*) *Re a Debtor, Ex parte the Debtor*, [1908] 1 K. B. 344, where a creditor had taken a bill of exchange for the amount of his judgment debt which was dishonoured but outstanding in the hands of a third party, and it was held that consequently a bankruptcy notice could not be issued on the judgment.

(*g*) Notwithstanding that the interpleader summons and the bankruptcy notice were issued on the same day (*Re Phillips, Ex parte Phillips* (1888), 5 Morr. 40). See generally title INTERPLEADER.

(*h*) *Ex parte Ford, Re Ford* (1886), 18 Q. B. D. 369. See also *Re Miller, Ex parte Miller* (1893), 10 Morr. 183.

(*i*) *Re Bates, Ex parte Lindsey* (1887), 4 Morr. 192; where a judgment had been obtained for £446 and a bankruptcy notice issued thereon, and after

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seized in an execution against the judgment debtor and the consequent issue of an interpleader summons without a return having been made by the sheriff prevent the issue of a bankruptcy notice (*k*), but a withdrawal by the sheriff from execution on goods not belonging to the debtor does not prevent the issue of a second writ of *fi. fa.* against the debtor's goods, and therefore does not operate as a stay of execution within this provision (*l*).

Garnishee.

A garnishee order absolute made against the judgment debtor as garnishee constitutes a stay of execution (*m*); but the service upon the debtor, during the currency of the bankruptcy notice, either of a garnishee order *nisi* (*n*) or of an order charging shares, the property of the debtor, is not a sufficient ground for setting aside the notice (*o*).

Leave to issue execution against partner.

In the case of a judgment against a firm of partners, the fact that the leave necessary to issue execution against an individual partner, who has not been personally served with a writ of summons in the action, and who has not appeared in his own name or admitted that he is, or has been adjudged to be, a partner, has not been obtained, operates as a stay of execution preventing the issue of a bankruptcy notice against such partner (*p*).

Giving of security.

45. Where the debtor gives security to the satisfaction of the creditor within seven days after service of a bankruptcy notice, the creditor cannot, so long as the security remains in force, issue a fresh notice in respect of the same debt (*q*). Similarly the acceptance within the seven days by the creditor of a promissory note for the amount of the debt is a conditional payment thereof which satisfies the conditions of the notice and stays any further proceedings thereon (*r*).

Amount of debt.

46. A bankruptcy notice can only be issued for the judgment debt or that part thereof on which the creditor can issue execution, and therefore cannot be issued on the whole of a judgment debt of which a part has been paid by the debtor (*s*). Where judgment is signed for an agreed sum, and there is a collateral agreement for payment by instalments, a notice cannot be issued in respect of overdue instalments (*t*), but a notice can be issued in respect of

an interpleader order the claimant paid £20 into court in respect of part of the goods the subject of the execution.

(*k*) *Re Follows, Ex parte Follows*, [1895] 2 Q. B. 521.

(*l*) *Re a Debtor, Ex parte Smith*, [1902] 2 K. B. 260.

(*m*) *Re Connan, Ex parte Hyde* (1888), 20 Q. B. D. 690.

(*n*) *Re Dennis, Ex parte Dennis* (1888), 60 L. T. 348. See also *Re H. B.*, [1904] 1 K. B. 94, at p. 97.

(*o*) *Re Sedgwick, Ex parte Sedgwick* (1888), 5 Morr. 262.

(*p*) R. S. C., Ord. 48 A, r. 8. See title PARTNERSHIP. See also *Ex parte Ide, Re Ide* (1886), 17 Q. B. D. 755.

(*q*) *Re Smith, Ex parte Durban*, [1903] 1 K. B. 33.

(*r*) *Ex parte Matthew, Re Matthew* (1884), 12 Q. B. D. 506. As to the effect of an act of bankruptcy committed during the currency of a bill of exchange upon the rights of a petitioning creditor, see p. 42, *post*, and *Re Raatz, Ex parte Raatz*, [1897] 2 Q. B. 80. See also title BILLS OF EXCHANGE ETC.

(*s*) *Re Child, Ex parte Child*, [1892] 2 Q. B. 77; *Re Raymond* (1892), 9 Morr. 108.

(*t*) *Re H. B.*, [1904] 1 K. B. 94. Non-compliance with a bankruptcy notice is not an act of bankruptcy so long as the terms of the judgment on which it is founded are controlled by an outside agreement between the judgment debtor and creditor (*ibid.*, *per* STIRLING, L.J., at p. 105).

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the whole sum if the agreement contains a default clause that the whole balance becomes due upon the failure to pay an instalment (*a*). Where a judgment is obtained for a certain sum and costs to be taxed a bankruptcy notice can be issued for the amount of the judgment without the costs (*b*). Statutory interest on the judgment debt may be included in the amount of the debt (*c*), but not interest at an agreed rate higher than the statutory rate (*d*).

Second notice.

47. The issue and withdrawal of a bankruptcy notice does not prevent the issue of a second notice in respect of the same judgment debt (*e*), and this principle applies notwithstanding that the withdrawal of the first notice is due to a decision of the court that the debt upon which the notice is founded is not a good petitioning creditor's debt (*f*).

Procedure on issue.

48. Before issuing a bankruptcy notice, the judgment creditor or his solicitor must fill in a request for its issue (*g*) and a form of notice in the prescribed form, with such variations as circumstances may require (*h*), and present them at the office of the registrar of the court. At the time of lodging the request the person lodging it must also produce an office copy of the judgment on which the notice is founded and lodge two copies of the notice to be sealed and issued for service (*i*). Where a company is the creditor the solicitor of the company can make the request without authorisation under seal (*j*).

Form of notice.

The notice must follow the terms of the judgment, so that the debtor can be informed as to the creditor whom he is required to pay (*k*), but an immaterial omission (*l*) or error (*m*)

(*a*) *Re Feast, Ex parte Feast* (1887), 4 Morr. 37.
(*b*) *Re G. J., Ex parte G. J.*, [1905] 2 K. B. 678.
(*c*) *Re Lehmann, Ex parte Hasluck* (1890), 7 Morr. 181.
(*d*) *Re a Debtor*, unreported, *ex relatione* counsel in the case.
(*e*) *Re Feast, Ex parte Feast, supra.*
(*f*) *Re Vitoria, Ex parte Vitoria*, [1894] 2 Q. B. 387.
(*g*) Bankruptcy Rules, r. 137; *ibid.*, Appendix, Forms, No. 5.
(*h*) *Ibid.*, r. 136 (1); *ibid.*, Appendix, Forms, No. 6. Variations are necessary, *e.g.*, in cases where a domiciled English debtor is resident abroad. Where the debtor resides at a place other than his place of business, both addresses should be inserted. For special forms in all cases, see Chalmers and Hough on the Bankruptcy Acts, 1883 and 1890, 6th ed., by Muir Mackenzie and Clarke, p. 680. Where it appears from the request that the debtor is residing abroad, and that the notice must be served abroad, the days for payment and for filing affidavit must be inserted in the notice at the time of issue, and a note to the effect that leave has been granted to serve the notice out of England must appear on the face thereof. Where it is desired to serve an ordinary notice (not describing the debtor as residing abroad) out of England, the order giving leave to do so should amend the dates as above, and a note to the effect that leave has been granted to serve the notice out of England must be inserted.
(*i*) *Ibid.*, r. 137.
(*j*) *Re Parkes, Ex parte Pneumatic Tyre Co.* (1896), 3 Mans. 95.
(*k*) *Re Howes, Ex parte Hughes*, [1892] 2 Q. B. 628.
(*l*) The court has power under s. 105 (3) of the Bankruptcy Act, 1883, to amend any proceeding under the Act, and will amend a defect which is not substantial or likely to affect the rights of the debtor, *e.g.*, where the creditor's name was omitted at the head of the notice after the words "*ex parte*" (*Re Bates, Ex parte Lindsey* (1887), 4 Morr. 192). See also *Ex parte Owen, Re Owen* (1884), 13 Q. B. D. 113.
(*m*) *E.g.*, where the judgment had been obtained against four in an action

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does not invalidate it. Two or more judgment debts cannot be included in one notice (*n*), and this defect cannot be amended (*o*). As a general rule an amendment of a bankruptcy notice will not be allowed, except in the case of a merely formal defect (*p*). The address of the creditor should be an address where the debt can be paid, and not merely one where the creditor can be heard of (*q*). The notice should require payment of the amount due on the judgment; and therefore where part of the debt only is claimed it should be made clear upon the notice that the remainder is no longer claimed as being due on the judgment (*r*).

Court by which issued.

A bankruptcy notice may be issued by any court in which a bankruptcy petition against the debtor might be filed (*s*). It will not be invalid by reason that it is issued by a wrong court; but in such a case it may be set aside on the application of the debtor on terms within the discretion of the court (*t*).

Indorsement of notice.

Every bankruptcy notice must be indorsed with the name and place of business of the solicitor of the judgment creditor, or where the latter appears in person with a memorandum stating that he does so (*a*).

Effect of counterclaim etc.

49. Where the debtor has a counterclaim, set-off, or cross demand which equals or exceeds the amount of the judgment debt, and which he could not have set up in the action in which the judgment was obtained, he must, if the notice is served in England, within three days, or, if served elsewhere, within a time fixed by the registrar upon the issue of the notice, file an affidavit to that effect with the registrar of the court which issued the notice (*b*). An indorsement intimating to the debtor the necessity of complying with these requirements must appear on every bankruptcy notice (*c*).

Setting aside of notice.

The filing of such an affidavit operates as an application to set aside the bankruptcy notice; and the registrar fixes a day for hearing the same on three days' notice to all parties, subject to an extension of time if the day fixed occurs after the expiration of the last day on which the notice can be complied with. In the latter case no act of bankruptcy is deemed to have been committed under the notice until after the hearing and determination of the application (*d*).

Set-off must be presently effective.

The set-off relied on must be one which is effective at the time of the application, and not merely one which will become effective after bankruptcy; and the mere fact that the debt will be

against six defendants, and the judgment was described as being against the six defendants (*Re Low, Ex parte Gibson*, [1895] 1 Q. B. 734). See also *Re Lorrimar, Ex parte Constable* (1890), 7 Morr. 235.

(*n*) *Re Low, Ex parte Argentine Gold Fields, Ltd.*, [1891] 1 Q. B. 147; *Re a Bankruptcy Notice* (1907), 96 L. T. 133.

(*o*) *Re O. C. S., Ex parte the Debtor*, [1904] 2 K. B. 161.

(*p*) *Ex parte Dan Rylands, Ltd., Re Collier* (1891), 8 Morr. 80.

(*q*) *Re Stogdon, Ex parte Leigh*, [1895] 2 Q. B. 534.

(*r*) *Re H. B.*, [1904] 1 K. B. 94.

(*s*) Bankruptcy Rules, r. 136 (2). See p. 47, *post*.

(*t*) *Ibid.*, r. 136 (3).

(*a*) *Ibid.*, r. 138 (1).

(*b*) *Ibid.*, r. 138 (2), (3), Appendix, Forms, No. 8.

(*c*) *Ibid.*, r. 138 (2), Appendix, Forms, No. 6.

(*d*) *Ibid.*, r. 139, Appendix, Forms, No. 9.

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discharged by a set-off in the event of bankruptcy does not invalidate the notice (*e*).

On the hearing of the application the court will not go behind the judgment on which the notice is founded, but is confined to the consideration of the matters contained in the provisions as to set-off. An order setting aside a bankruptcy notice which the judgment creditor was entitled to issue cannot be made on any other grounds (*f*).

Grounds for setting aside notice.

Order setting aside notice.

When the court makes an order setting aside a bankruptcy notice it may at the same time, and generally will, declare that no act of bankruptcy has been committed by the debtor in not complying within the prescribed time with the notice (*g*).

Adjournment.

An adjournment of an application to set aside a bankruptcy notice is only granted upon evidence by the debtor of some sufficient reason for setting aside the notice (*h*).

Appeals.

Notice of appeal from an order refusing to set aside a bankruptcy notice must be given within fourteen days from the hearing of the application (*i*).

Service of notice.

50. Service of a bankruptcy notice and proof of service thereof is effected in the same manner as service of a creditor's petition (*k*). Subject to the power of the court to extend the time, a bankruptcy notice to be served in England must be served within one month from the issue thereof (*l*).

When act of bankruptcy complete.

51. This act of bankruptcy is complete immediately upon the expiration of the last day on which the bankruptcy notice can be complied with (*m*).

SUB-SECT. 10.—*Notice of Suspension or Intended Suspension of Payment.*

Notice of suspension.

52. A debtor, whether a trader or not (*n*), commits an act of bankruptcy if he gives notice to any of his creditors that he has suspended, or that he is about to suspend, payment of his debts (*o*). But this act of bankruptcy cannot be committed by a foreigner resident abroad (*p*).

(*e*) *Re G. E. B.*, [1903] 2 K. B. 340. See also *Re Isaac, Ex parte Isaac* (1885), 2 Morr. 258, where a debtor had allowed judgment to go by default against him and subsequently had obtained leave to defend on payment of a certain sum into court. The debtor having neglected to make this payment and having offered no security, it was held that he had not an effective set-off against the judgment debt, which he could not have set up in the action.

(*f*) *Re Easton, Ex parte Dixon* (1893), 10 Morr. 111.

(*g*) Bankruptcy Rules, r. 142.

(*h*) *Re Cole, Ex parte Attenborough*, [1898] 1 Q. B. 290. A statement of claim in an action to set aside the judgment on which the notice is founded is not sufficient reason (*Re Foster, Ex parte Basan* (1885), 2 Morr. 29). See also *Re Kelday, Ex parte Meston* (1888), 36 W. R. 585, where an equitable mortgagee, having obtained a foreclosure decree and an order for the sale of the property, had served a bankruptcy notice in respect thereof, and it was held that the fact that the sale had not been carried out was not a sufficient ground for an adjournment.

(*i*) *Re Phillips, Ex parte Phillips* (1888), 5 Morr. 187.

(*k*) Bankruptcy Rules, r. 141; and see p. 51, *post*.

(*l*) *Ibid.*, r. 140.

(*m*) *Re Maud, Ex parte Townend* (1891), 8 Morr. 144.

(*n*) See *Re Scott, Ex parte Scott*, [1896] 1 Q. B. 619.

(*o*) Bankruptcy Act, 1883 (46 & 47 Vict. c. 52), s. 4 (1) (h).

(*p*) *Cooke* v. *Charles A. Vogeler Co.*, [1901] A. C. 102.

SUB-SECT. 10. Notice of Suspension of Payment.

The notice need not be in writing, an oral statement being sufficient if it complies with the general principles applicable to this act of bankruptcy (*q*). The notice must be given to a creditor or creditors (*r*). A letter written "without prejudice" by a debtor to a creditor giving notice of suspension is admissible in evidence to prove this act of bankruptcy (*s*).

Form of notice.

53. As a general rule the notice takes the form of a circular letter issued to his creditors by a debtor. The question whether or not the contents of such a notice constitute an act of bankruptcy is one of fact to be decided in each case (*t*). The effect produced on the mind of the creditor by a notice the words of which infer an intention to suspend payment is a general test which may be applied in answering this question, and in the case of a trader the notice must be regarded from the point of view of its effect upon the mind of a business man (*a*). At the same time words which do not in themselves import an intention to suspend payment cannot constitute a notice of suspension within this principle merely by reason of the effect produced on the mind of the person addressed (*b*). Where the notice states or implies that a refusal by the creditors to accept a proposed scheme or composition will involve either immediate suspension of payment or bankruptcy, it is sufficient (*c*).

What notice amounts to act of bankruptcy.

But the fact that the debtor has called a meeting of his creditors and offered a composition is not a sufficient notice of suspension (*d*), nor does a statement by his solicitors, pending negotiations commenced after a judgment against him, to the effect that a receiving order would be applied for immediately, if execution was issued,

Insufficient notices.

(*q*) *Ex parte Nickoll, Re Walker* (1884), 13 Q. B. D. 469; *Ex parte Oastler, Re Friedlander* (1884), 13 Q. B. D. 471, where this principle was affirmed, but the actual statement made was held not sufficiently definite. See also *Ex parte Scott, Re Scott*, [1896] 1 Q. B. 619, where an oral statement was admitted.

(*r*) *Re Miller*, [1901] 1 Q. B. 51.

(*s*) *Re Daintrey, Ex parte Holt*, [1893] 2 Q. B. 116.

(*t*) *Re Lamb, Ex parte Gibson and Bolland* (1887), 4 Morr. 25, *per* BOWEN, L.J., at p. 32.

(*a*) *Re Lamb, supra; Crook* v. *Morley*, [1891] A. C. 316, *per* Lord SELBORNE, at p. 321. In the latter case the circular took the following form: "Being unable to meet my engagements as they fall due, I invite your attendance at ——, when I will submit a statement of my position for your consideration and decision." This was held to constitute an act of bankruptcy, as also was the following notice (*Re Simonson, Ex parte Ball*, [1894] 1 Q. B. 433): "We regret to inform you that —— and other matters have placed us in financial difficulties which makes it desirable for us to consult with our creditors as to our position. We are having our books examined and a statement prepared by ——, chartered accountants, and as soon as this is complete we propose inviting you to a meeting of our creditors. . . ." See also *Re Miller*, [1901] 1 K. B. 51.

(*b*) *Re Phillips, Ex parte W. Thomas & Co.* (1897), 76 L. T. 531, where the following statement was held not sufficient: "If you do not continue to supply me with bricks I shall not be able to carry out my contracts, and shall have to stop payment."

(*c*) *Re Lamb, supra; Re Wolstenholme, Ex parte Wolstenholme* (1885), 2 Morr. 213; *Re Waite, Ex parte Bentley's Yorkshire Breweries* (1894), 1 Mans. 512. See also *Re Entwistle, Ex parte Turner* (1892), 65 L. T. 349; *Re Selwood, Ex parte Dash* (1894), 1 Mans. 66; *Re Dagnall, Ex parte Soan*, [1896] 2 Q. B. 407; *Re Johns, Ex parte Spears* (1893), 10 Morr. 190.

(*d*) *Re Walsh, Ex parte the Trustee* (1885), 2 Morr. 112.

SUB-SECT. 10. Notice of Suspension of Payment.

constitute a sufficient notice (*e*). A communication to a creditor by a solicitor, to the effect that he had received instructions from the debtor to issue a circular letter to creditors, is not a notice of suspension of payment by the debtor (*f*), nor is a request by an insolvent stockbroker that his creditors should close their accounts with him owing to his difficulty in paying them at an approaching settlement (*g*).

Generally speaking, a notice by a debtor which states or implies that he is insolvent is not sufficient unless it states or implies that he intends to deal collectively with his creditors (*g*); and where this act of bankruptcy forms part of the procedure by which an assignment for the benefit of creditors has been effected and is communicated to the creditors, it cannot be relied on by a creditor who has assented to the assignment (*h*).

SECT. 3.—*Petition.*

SUB-SECT. 1.—*In General.*

Consequences of petition.

54. If a debtor who is subject to the English bankruptcy laws commits an act of bankruptcy, the court may, on a petition presented to it, make a receiving order for the protection of his estate (*i*).

The first step which has to be taken by a person, whether a creditor or the debtor himself, who seeks to have a debtor's estate administered for the benefit of his creditors according to bankruptcy law, is a petition to the court which has bankruptcy jurisdiction over the debtor (*k*). Under the present law the petitioner asks for, and if successful obtains, a receiving order, and not, as under former Acts, an immediate adjudication of bankruptcy. But on the hearing of the petition the court decides definitely whether or not the debtor's estate is to be administered for the benefit of his creditors under the Act by one or other of the methods prescribed by the Act, *i.e.*, adjudication, composition, or a scheme of arrangement (*l*).

SUB-SECT. 2.—*Creditor's Petition.*

Requisites for creditor's petition.

55. A creditor is not entitled to present a bankruptcy petition against a debtor, unless (1) the debt owing by the debtor to the petitioning creditor, or, if two or more creditors join in the petition, the aggregate amount of debts owing to the several petitioning creditors, amounts to £50; (2) the debt is a liquidated sum payable either immediately or at some certain future time; (3) the act of

(*e*) *Trustees of Lord Hill* v. *Rowlands*, [1896] 2 Q. B. 124.
(*f*) *Re Morgan, Ex parte Turner* (1895), 2 Mans. 508.
(*g*) *Clough* v. *Samuel*, [1905] A. C. 442.
(*h*) *Re Hawley, Ex parte Ridgway* (1897), 4 Mans. 41, where it was held that a circular convening creditors to a meeting could not be relied on by a creditor assenting to the deed. See also *Re Woodroff, Ex parte Woodroff* (1897), 4 Mans. 46, where the same principle was applied to a circular requesting the creditors' assent to a deed already executed. As to assenting creditors generally, see p. 15, *ante*.
(*i*) Bankruptcy Act, 1883 (46 & 47 Vict. c. 52), s. 5. See also pp. 56 *et seq.*, *post*.
(*k*) As to courts having such jurisdiction, see p. 6, *ante*.
(*l*) See *Re Pinfold, Ex parte Pinfold*, [1892] 1 Q. B. 73, *per* VAUGHAN WILLIAMS, J., at p. 75.

bankruptcy on which the petition is founded has occurred within three months before the presentation of the petition; and (4) the debtor is domiciled in England, or, within a year before the date of the presentation of the petition, has ordinarily resided or had a dwelling-house or place of business in England (*m*).

What creditors may present petition.

56. Generally speaking, any person who has a right to claim immediate payment of a sum of money due to him, and is capable of giving a valid release to the debtor, may, if other prescribed conditions are satisfied, maintain a bankruptcy petition against the debtor; but there are some cases in which a creditor can present a petition against a debtor, notwithstanding that, if the debtor were solvent, the creditor could not claim immediate payment (*n*).

Company.

An incorporated company may be a petitioning creditor (*o*). The petition must be in the name of the company; if it is in liquidation, the petition must be in the name of the company, and not of the liquidator (*p*).

Cost-book mining company.

A petition by a cost-book mining company against a shareholder must be in the name of the company, and not of the purser (*q*).

Unincorporated company.

A petition by an unincorporated company or co-partnership duly authorised to sue and to be sued in the name of a public officer or agent may be presented in the name of such public officer or agent (*r*) on his filing an affidavit that he is such public officer or agent and is entitled to present the petition (*s*).

Partners.

57. A petition by a partnership firm may be presented in the name of the firm (*t*), and in that case may be signed by one partner only on behalf of the firm (*a*). One partner may present a petition against a co-partner in respect of a distinct debt for which an action

(*m*) Bankruptcy Act, 1883 (46 & 47 Vict. c. 52), s. 6 (1). See p. 43, *post*.

(*n*) See *Re Raatz, Ex parte Raatz*, [1897] 2 Q. B. 80.

(*o*) *Ex parte Dan Rylands, Ltd., Re Collier* (1891), 64 L. T. 742; *Re Whitley, Ex parte Mirfield Commercial Co.* (1891), 65 L. T. 351; *Re Sanders, Ex parte Sanders* (1894), 1 Mans. 382.

(*p*) *Re Winterbottom, Ex parte Winterbottom* (1886), 18 Q. B. D. 446; *Re Shirley, Ex parte Madsay* (1887), 58 L. T. 237; *Re Bassett, Ex parte Lewis* (1895), 2 Mans. 177.

(*q*) Notwithstanding that the purser, as nominal plaintiff, has recovered judgment under the Stannaries Act, 1869 (32 & 33 Vict. c. 19), s. 13, and that the petition is based on that judgment (*Re Nance, Ex parte Ashmead*, [1893] 1 Q. B. 590).

(*r*) Bankruptcy Rules, r. 258. See *Ex parte Dan Rylands, Ltd., Re Collier, supra*. This rule meets the case of *Guthrie* v. *Fisk* (1824), 3 B. & C. 178, which decided that such an officer, though empowered to sue and be sued, could not present a bankruptcy petition.

(*s*) *Re Cripps, Ross & Co., Ex parte Ross* (1888), 5 Morr. 226.

(*t*) Bankruptcy Act, 1883 (46 & 47 Vict. c. 52), s. 115; *Re Wenham, Ex parte Battams*, [1900] 2 Q. B. 698.

(*a*) Bankruptcy Rules, r. 259, Appendix, Forms, No. 10, note; *Re Hobbs, Ex parte Hobbs* (1892), 66 L. T. 144; see *Ex parte Hodgkinson* (1815), 19 Ves. 296. As to the right of a solvent partner, when one of the partners is bankrupt, to present a petition in respect of a partnership debt, see *Ex parte Blakey, Re Blakey* (1822), 1 Gl. & J. 197, and *Re Beauchamp Brothers, Ex parte Carr* (1896), 3 Mans. 207, *per* VAUGHAN WILLIAMS, J., at p. 209. As to a partner presenting a petition with the indirect motive of excluding his co-partner from the co-partnership, see *King* v. *Henderson*, [1898] A. C. 720.

SUB-SECT. 2. Creditor's Petition.

might have been brought notwithstanding any partnership, but not in cases where it would depend upon taking partnership accounts whether the sum was due or not (*b*). If a partner brings an action for an account and treats a debt due to him by his co-partner as mixed up with the partnership accounts, he cannot afterwards present a petition in respect of such debt (*c*).

Joint creditors.

One of two joint obligees under a bond is not by himself a good petitioning creditor (*d*). But when one of three joint creditors has died, a petition may be presented by the two survivors (*e*). If one of two partners who have filed a petition against a debtor becomes bankrupt before the petition is heard, the trustee of the bankrupt partner should be made a co-petitioner (*f*).

Executors.

One of several executors may present a petition in respect of a debt due to the executors (*g*). An executor may present a petition against a debtor to the deceased before taking out probate (*h*).

Receivers.

58. A receiver of an estate cannot as such present a bankruptcy petition in respect of a debt which is due to the estate, and which the debtor has been ordered to pay to the receiver (*i*), but which has not been assigned to him. But if a receiver is the holder of a bill of exchange (*k*) or the assignee of a judgment debt (*l*), he can present a petition based on the debt. Where in divorce proceedings the co-respondent has been ordered by the court to pay damages to the petitioner the amount of which is ordered to be brought into court or is otherwise subject to the control of the Divorce Court, the petitioner is in the position of a receiver, and cannot present a bankruptcy petition (*m*).

King's Proctor.

The King's Proctor who has intervened in a divorce suit, and to whom a party has been ordered to pay costs, is not in the position of a receiver, and may present a bankruptcy petition against the party, and the King's Proctor for the time being may present the petition although he did not hold the office when the costs payable by the party were incurred (*n*).

Trustee.

A person to whom a debt is due as a bare trustee may present a petition in certain cases, *e.g.*, when the beneficial owner of the debt is under disability (*o*). But when a debt is due to a person as a

(*b*) *Ex parte Notley, Re Notley* (1833), 1 Mont. & A. 46; *Windham* v. *Paterson* (1815), 1 Stark. 144; *Ex parte Richardson* (1833), 3 Deac. & Chitt. 244.

(*c*) *Ex parte Gray, Re Gray* (1835), 2 Mont. & A. 283.

(*d*) *Brickland* v. *Newsome* (1808), 1 Camp. 474.

(*e*) *Re W. Tucker, Ex parte J. W. Tucker* (1895), 2 Mans. 358.

(*f*) *Ex parte Owen, Re Owen* (1884), 13 Q. B. D. 113.

(*g*) *Ex parte Brown* (1832), 1 Deac. & Ch. 118.

(*h*) *Ex parte Paddy, Re Drakeley* (1818), 3 Madd. 241; *Rogers* v. *James* (1816), 7 Taunt. 147; *Re Masonic and General Life Assurance Co.* (1886), 32 Ch. D. 373.

(*i*) *Re Sacker, Ex parte Sacker* (1888), 22 Q. B. D. 179.

(*k*) *Ex parte Harris* (1876), 2 Ch. D. 423.

(*l*) *Re Macoun*, [1904] 2 K. B. 700.

(*m*) *Ex parte Muirhead, Re Muirhead* (1876), 2 Ch. D. 22; *Re O'Gorman, Ex parte Bale*, [1899] 2 Q. B. 62; *Ex parte Fryer, Re Fryer* (1886), 17 Q. B. D. 718.

(*n*) *Ex parte Rayner, Re Rayner* (1877), 37 L. T. 38.

(*o*) *Ex parte Culley, Re Adams* (1878), 9 Ch. D. 307, *per* COTTON, L.J., at p. 311.

mere trustee for an absolute beneficial owner who is capable of dealing with the debt as he pleases, the trustee cannot alone present a petition upon the debt, but the beneficial owner must join in the petition (*p*). If a person to whom a debt is due as trustee is also beneficially entitled to part of the debt, he may present a petition on the debt without joining the *cestui que trust* (*q*).

Equitable assignee.

The equitable assignee of a debt can present a petition on it without joining the assignor (*r*), but a judgment creditor who has obtained a garnishee order against a person indebted to the judgment debtor cannot present a bankruptcy petition against that person (*s*).

Factor.

A factor who sells goods in his own name, even though not on a *del credere* commission, may present a petition against the purchaser of the goods, but cannot do so if the principal has agreed with the factor to treat the purchaser as the debtor of the principal, and has taken steps to recover the debt directly from the purchaser (*t*).

Infants.

59. An infant creditor may present a petition in bankruptcy by a next friend (*a*).

Lunatics.

A lunatic who has been so found by inquisition may present a petition acting by the committee appointed by the Lunacy Court, or, if not so found, then acting by a person appointed by the Bankruptcy Court or by the Lunacy Court (*b*).

Married women.

A married woman may be a petitioning creditor in respect of any debt which is her separate property (*c*). In respect of a debt for the recovery of which she cannot sue without her husband, her husband must join with her in presenting a petition (*d*).

Husband and wife.

If a husband lends money to his wife trading in respect of her separate estate separately and apart from him, he can present a bankruptcy petition against her (*e*).

Bankrupts.

60. An undischarged bankrupt can present a bankruptcy petition in respect of debts due to him which his trustee either cannot or does not intervene to claim, such as, in certain cases, salary due to him (*f*). So, if he has brought an action in respect of some

(*p*) *Ex parte Culley, Re Adams* (1878), 9 Ch. D. 307; *Ex parte Dearle, Re Hastings* (1884), 14 Q. B. D. 184. If a petition is presented by a bare trustee, leave may be given to amend by joining the *cestui que trust* (*Ex parte Dearle, supra*).

(*q*) *Re Gamgee, Ex parte Gamgee* (1891), 8 Morr. 182.

(*r*) *Ex parte Cooper, Re Baillie* (1875), L. R. 20 Eq. 762. See p. 42, *post.*

(*s*) *Re Combined Weighing and Advertising Machine Co.* (1889), 43 Ch. D. 99.

(*t*) *Sadler* v. *Leigh* (1815), 4 Camp. 195.

(*a*) *Ex parte Brocklebank, Re Brocklebank* (1877), 6 Ch. D. 358.

(*b*) Bankruptcy Act, 1883 (46 & 47 Vict. c. 52), s. 148; Bankruptcy Rules, r. 271 A. See, as to lunatics generally, *Re R. S. A.*, [1901] 2 K. B. 32, and title LUNATICS AND PERSONS OF UNSOUND MIND.

(*c*) Married Women's Property Act, 1882 (45 & 46 Vict. c. 75), ss. 1, 12. See title HUSBAND AND WIFE.

(*d*) See *Re Atkinson* (1825), 2 Mol. 451; *Ex parte Mogg, Re Mogg* (1828), 2 Gl. & J. 397; *Rumsey* v. *George* (1813), 1 M. & S. 176.

(*e*) *Butler* v. *Butler* (1884), 16 Q. B. D. 374.

(*f*) *Kitson* v. *Hardwick* (1872), L. R. 7 C. P. 473; *Ex parte Cartwright, Re Whitehouse* (1815), 2 Rose, 230. As to intervention by the trustee, see p. 167, *post.*

SUB-SECT. 2. Creditor's Petition.

personal wrong and has obtained judgment, he can, if his trustee has not intervened to claim the money, present a petition in respect of the judgment debt (*g*).

Aliens.

61. There is nothing to prevent an alien from presenting a bankruptcy petition, if a debt is owing to him for which he can maintain an action (*h*).

Sole creditors.

62. A man who is the only creditor of a debtor can present a bankruptcy petition against him (*i*).

Creditors who have not served bankruptcy notice.

63. Where the act of bankruptcy consists of failure to comply with a bankruptcy notice, any creditor who has a good petitioning creditor's debt may present a petition founded on that act of bankruptcy, the right to present such petition not being confined to the creditor who served the notice (*k*). If the creditor who served the notice has been paid after the debtor has committed an act of bankruptcy by failing to comply with the notice, another creditor may nevertheless present a petition (*l*).

Holder of bill of exchange.

The holder of a current bill of exchange may present a petition against the acceptor before the maturity of the bill, if the acceptor has committed an available act of bankruptcy (*m*).

Tender of payment.

If after the commission of an act of bankruptcy the debtor tenders to one of his creditors the amount of the creditor's debt, the creditor, if he has notice of the act of bankruptcy, should until the lapse of three months from the act of bankruptcy refuse to receive the debt; and the fact that he has so refused is no reason for refusing to make a receiving order founded on the debt (*n*).

Debt must exist before act of bankruptcy.

64. A person to whom a debt is due from a debtor, or who is the holder of a bill of exchange accepted by a debtor, cannot maintain a bankruptcy petition against him unless the debt has come into existence or the bill of exchange was issued before the date of the act of bankruptcy on which the petition is founded (*o*). But it

(*g*) See *Ex parte Vine, Re Wilson* (1878), 8 Ch. D. 364; *Rose* v. *Buckett*, [1901] 2 K. B. 449; *Ex parte Robinson, Re Freer* (1828), Mont. & M. 44.

(*h*) *Ex parte Pascal, Re Myer* (1876), 1 Ch. D. 509.

(*i*) *Re Hecquard, Ex parte Hecquard* (1889), 24 Q. B. D. 71, *per* LINDLEY, L.J., at p. 76: "If the debtor has only one creditor, this is a point to be considered by the registrar on hearing the petition, but it cannot be laid down as a matter of principle that if there is only one creditor, the registrar ought to dismiss the petition. The trustee in a bankruptcy may be able to set aside transactions and get in assets which could not be set aside or got in without an adjudication of bankruptcy. The mere fact that a man has only one creditor is not a sufficient ground for saying that bankruptcy proceedings cannot be maintained against him." See also *Ex parte Painter, Re Painter*, [1895] 1 Q. B. 85.

(*k*) *Ex parte Dearle, Re Hastings* (1884), 14 Q. B. D. 184.

(*l*) *Re Powell, Ex parte Powell* [1891] 2 Q. B. 324.

(*m*) *Re Raatz, Ex parte Raatz*, [1897] 2 Q. B. 80.

(*n*) *Ponsford, Baker & Co.* v. *Union of London and Smith's Bank*, [1906] 2 Ch. 444, at p. 452; *Re Low, Ex parte Low* (1890), 7 Morr. 25. But if the debtor has but one creditor and the debt is tendered to him even after an act of bankruptcy and refused, the court would probably not make a receiving order against the debtor.

(*o*) *Ex parte Sadler, Re Whelan* (1878), 39 L. T. 361; *Ex parte Hayward, Re Hayward* (1870), 6 Ch. App. 546.

will be sufficient for the maintenance of a petition, if the original debt due by the debtor accrued before the act of bankruptcy was committed; and the circumstance that after the commission of the act of bankruptcy the debt became merged in a judgment will not prevent the maintenance of the petition (*p*).

Creditors precluded from petitioning.

A creditor cannot present a petition, if the act of bankruptcy on which he relies is one to which he has himself been privy; *e.g.*, he cannot present a petition founded on the execution by a debtor of a deed of assignment of property to a trustee for the benefit of creditors, if he has been a party to the deed or privy to the negotiation or execution of it, or has done any act amounting to an acquiescence in the deed or a recognition of the trustee's title (*q*). A creditor who has so acted with reference to an assignment for the benefit of creditors that he cannot be allowed to found a bankruptcy petition on the deed cannot present a petition founded on a notice to himself or other creditors of the execution of the deed as being notice of suspension of payment and therefore an act of bankruptcy (*r*). But if the creditor is not bound by the deed, he is not, by being privy to its execution or by acquiescence in it, precluded from presenting a petition against the debtor founded on an independent act of bankruptcy (*s*).

A creditor who is party to a composition deed containing a release of the debts due to the creditors who are parties to it, with a provision that the release is to be void if the debtor makes default in payment, will not on such a default be permitted to maintain a petition in bankruptcy against the defaulting compounding debtor, if the creditor has attempted to obtain a secret advantage over the other creditors (*t*).

A creditor whose consent to a deed of assignment has been obtained by fraud may avail himself of the execution of the deed as an act of bankruptcy, and may present a petition against the debtor (*a*).

A creditor will not be allowed to maintain a bankruptcy petition if the object of the petition or the bankruptcy proceedings is improperly to extort money, or to put pressure on a debtor for some collateral or inequitable purpose (*b*).

(*p*) *Ex parte King and Beesley, Re King and Beesley*, [1895] 1 Q. B. 189.

(*q*) *Ex parte Payne* (1847), De G. 534; *Ex parte Alsop, Re Rees* (1859), 1 De G. F. & J. 289; *Ex parte Stray, Re Stray* (1867), 2 Ch. App. 374; *Evans* v. *Hallam* (1871), L. R. 6 Q. B. 713, at p. 717; *Re Smith & Sons, Ex parte Rook* (1889), 6 Morr. 30; *Re Adamson, Ex parte Viney* (1894), 2 Mans. 153; *Re Thomas Hawley, Ex parte Ridgway* (1897), 4 Mans. 41; *Re Woodroff, Ex parte Woodroff* (1897), 4 Mans. 46; *Re Carr, Ex parte Jacobs* (1902), 85 L. T. 552; *Re Day, Ex parte Hammond* (1902), 86 L. T. 238; *Re Brindley, Ex parte Taylor, Sons & Co.*, [1906] 1 K. B. 377.

(*r*) *Re Woodroff, Ex parte Woodroff, supra; Re Thomas Hawley, Ex parte Ridgway, supra*, and see note (*h*) p. 34, *ante*.

(*s*) *Re Mills, Ex parte Mills*, [1906] 1 K. B. 389.

(*t*) *Ex parte Phillips, Re Harvey*, [1888] W. N. 88.

(*a*) *Re Tanenberg & Sons, Ex parte Perrier* (1889), 6 Morr. 49. See *Ex parte Thomas Marshall, Re Thomas Marshall* (1841), 1 Mont. D. & De G. 575.

(*b*) *Re Otway, Ex parte Otway*, [1895] 1 Q. B. 812; *Re Shaw, Ex parte Gill* (1901), 83 L. T. 754; *Re Bebro*, [1900] 2 Q. B. 316; *Re a Debtor* (1901), 91 L. T. 664. Compare *Re Brindley. Ex parte Taylor, Sons & Co., supra*, and *Re G.* (1900), 44 Sol. Jo. 345. See pp. 59, 60, *post*.

SUB-SECT. 3. Petitioning Creditor's Debt.

SUB-SECT. 3.—*Amount and Nature of Petitioning Creditor's Debt.*

Amount of petitioning creditor's debt.

65. The debt owing by the debtor to the petitioning creditor, or, if two or more creditors join in the petition, the aggregate debts owing to the several petitioning creditors, must amount to £50 (*c*). The debt must be one that was owing from the debtor at the time of the act of bankruptcy, although it need not at that time have been owing to the petitioning creditor (*d*).

Costs and interest.

The costs of an abortive execution cannot be added to a judgment debt for the purpose of making up the required amount. For such costs are not part of the judgment debt or a debt in any sense, and can only be recovered out of a particular fund, namely, the fruits of the particular execution, and the debtor is under no personal liability for them (*e*).

But statutory interest on a judgment debt becomes part of the judgment debt (*f*), and may be added to the judgment debt to make up the required amount (*g*).

Liquidated sum.

66. The debt must be a liquidated sum (*h*), payable either

(*c*) Bankruptcy Act, 1883 (46 & 47 Vict. c. 52), s. 6 (1) (a).

(*d*) *Ex parte Thomas* (1747), 1 Atk. 73; *Glaister* v. *Hewer* (1798), 7 Term Rep. 498; *Ex parte Hayward, Re Hayward* (1871), 6 Ch. App. 546. Thus if a creditor commences an action against a debtor claiming the amount of the debt, which is under £50 and a sum for costs which, added to the debt, amounts to £50, and on the same day the debtor commits an act of bankruptcy, and on a later day the creditor signs judgment for the debt and for costs, and then presents a bankruptcy petition against the debtor, there is no good petitioner's debt of sufficient amount at the date of the act of bankruptcy, the claim for costs not becoming a debt till judgment is signed (*Ex parte Sadler, Re Whelan* (1878), 48 L. J. (BCY.) 43). See *Re a Debtor* (1907), 97 L. T. 140.

(*e*) *Re William Long & Co., Ex parte Cuddeford* (1888), 20 Q. B. D. 316. It is otherwise as to costs of warrants in a county court (County Court Rules, 1903 and 1904, Ord. 25, r. 19); see title COUNTY COURTS.

(*f*) *Ex parte Lewis, Re Clagett* (1888), 36 W. R. 653.

(*g*) *Re Lehmann, Ex parte Hasluck* (1890), 7 Morr. 181.

(*h*) Bankruptcy Act, 1883 (46 & 47 Vict. c. 52), s. 6 (1) (b). A covenant to pay the excess of debts due by a firm over debts due to it is not a covenant to pay a liquidated sum, and the claim on the breach of such a covenant is for damages, and therefore a bankruptcy petition cannot be based thereon (*Ex parte Broadhurst, Re Broadhurst* (1853), 22 L. J. (BCY.) 21; *Walker* v. *Broadhurst* (1853), 23 L. J. (EXCH.) 71); so a claim for not redelivering shares lent by one person to another is not "a debt or sum of money due or claimed to be due" (*Owen* v. *Routh* (1854), 23 L. J. (C. P.) 105); but a claim by a lender of Government stock against the borrower for not retransferring the stock on an agreed day may be a good petitioning creditor's debt (*Utterson* v. *Vernon* (1790–2), 3 Term Rep. 539, and 4 Term Rep. 570). If one person gives to another a bond to pay such costs as the other person shall be liable to pay to a third party, the liability created by the bond is not a debt (*Johnson* v. *Diamond* (1855), 24 L. J. (EXCH.) 217). A liability to pay damages is not a liquidated sum payable either immediately or at some certain future time, and cannot be made the basis of a petition until the damages have been liquidated (*Re Miller*, [1901] 1 K. B. 51). An award of damages by the verdict of a jury without judgment or without an order of the Court giving effect to the verdict is not a liquidation of damages, and does not constitute a good petitioning creditor's debt (*Ex parte Muirhead, Re Muirhead* (1876), 2 Ch. D. 22, *per* COCKBURN, L.C.J., at p. 25). The amount of differences due to a Stock Exchange creditor by a defaulter on the London Stock Exchange, as fixed by the official assignee of that body under its rules, is a liquidated sum and a good petitioning creditor's debt (*Ex parte Ward, Re Ward* (1882), 20 Ch. D. 356; 22 Ch. D. 132; see also *Ex parte Mendelssohn, Re Mendelssohn*, [1903] 1 K. B. 216, and on appeal *sub nom. Mendelssohn* v.

SUB-SECT. 3. Petitioning Creditor's Debt.

immediately or at some certain future time (*i*), and must be owing from the debtor at the time when the act of bankruptcy is committed, and must be vested in the petitioning creditor at the time when the petition is presented, though it need not have been vested in him at the date of the act of bankruptcy (*k*). If a bill of exchange, which was accepted when incomplete before the acceptor committed an act of bankruptcy, is completed and issued after the act of bankruptcy, there is no good petitioning creditor's debt on which a petition can be based (*l*).

Debt must be recoverable by legal process.

67. Subject to the exception as to debts payable at some certain future time, the debt must be one that is recoverable by legal process. A debt which is barred by the Statute of Limitations (*m*) is not a debt on which a bankruptcy petition can be presented (*n*).

Infant's debt.

As an infant cannot contract a debt, except for necessaries, a petition cannot be presented against an infant in respect of a liability other than for necessaries (*o*); and as an infant cannot accept a bill of exchange even for necessaries, the indorsee of such a bill accepted by an infant cannot present a bankruptcy petition against the acceptor (*p*).

Surety.

A surety cannot present a petition in bankruptcy against his co-surety, unless he has paid more than his proportion of the sum guaranteed (*q*). So when two persons exchange acceptances, and one of them commits an act of bankruptcy before the bills mature, the other acceptor is not a good petitioning creditor unless he has paid his own acceptance (*r*).

Creditor with notice.

A creditor who has had notice of an act of bankruptcy committed by his debtor is justified in refusing payment of his debt and in proceeding to petition (*s*).

Ratcliff, [1904] A. C. 456). In an equitable mortgage where the borrower agrees to repay the principal on a stated day with interest at a fixed rate and to execute a legal mortgage for securing payment of the money owing with interest "at the rate aforesaid," if the money is not repaid on the stated day, there is a contract to pay interest at the fixed rate after the stated day; and if the interest is not paid after the stated day, there is a liquidated sum due, and not merely a claim for damages for breach of contract to repay the principal (*Ex parte Furber, Re King* (1881), 17 Ch. D. 191).

(*i*) Bankruptcy Act, 1883 (46 & 47 Vict. c. 52), s. 6 (1) (b).

(*k*) See *Ex parte Hayward, Re Hayward* (1871), 6 Ch. App. 546; *Ex parte Thomas* (1747), 1 Atk. 73; *Glaister* v. *Hewer* (1798), 7 Term Rep. 498. As to the purchase of a debt for the purpose of petitioning, see *Re Baker, Ex parte Baker* (1887), 5 Morr. 5; *Ex parte Griffin, Re Adams* (1879), 12 Ch. D. 480; *Ex parte Harper, Re Pooley* (1882), 20 Ch. D. 685.

(*l*) *Ex parte Hayward, Re Hayward, supra.*

(*m*) 21 Jac. 1, c. 16. For such debts generally see title LIMITATION OF ACTIONS.

(*n*) *Ex parte Tynte, Re Tynte* (1880), 15 Ch. D. 125.

(*o*) *Ex parte Kibble, Re Onslow* (1875), 10 Ch. App. 373; *Ex parte Jones, Re Jones* (1881), 18 Ch. D. 109. See also *Lovell and Christmas* v. *Beauchamp*, [1894] A. C. 607. As to the liability of infants, married women, lunatics, corporations, and companies to the bankruptcy laws, see pp. 9—12, *ante*.

(*p*) *Re Soltykoff, Ex parte Margrett*, [1891] 1 Q. B. 413.

(*q*) *Ex parte Snowdon, Re Snowdon* (1881), 17 Ch. D. 44; but see *Re Macdonald, Ex parte Grant*, [1888] W. N. 130, where it was held that a surety for a debt payable by instalments can, when one instalment has matured of which he has paid more than his share, petition against his co-surety.

(*r*) *Sarratt* v. *Austin* (1811), 4 Taunt. 200; *Ex parte Solarte, Re Knowles* (1832), 2 Deac. & Ch. 261.

(*s*) *Re Lowe, Ex parte Lowe* (1890), 7 Morr. 25. As to tender of amount of

SUB-SECT. 3. Petitioning Creditor's Debt.

If a simple contract debt at the date of the act of bankruptcy becomes afterwards merged in a judgment or a security of a higher nature, the merger does not operate as an extinguishment of the debt for the purposes of bankruptcy proceedings, and the debt is still available as a petitioning creditor's debt (*t*).

Merger.

Equitable debt.

Before the Bankruptcy Act of 1869 (*a*) no petition could be presented unless the petitioning creditor's debt was a legal debt. Consequently liability to pay money under a decree of a court of Equity was formerly not a debt on which a petition could be grounded (*b*). Under the Act of 1869 the debt on which a petition could be presented was one due "at law or in equity." The Bankruptcy Act, 1883, does not contain these words, as the Judicature Act, 1873 (*c*), had made them unnecessary, and a petition can be founded on a judgment of the Chancery Division of the High Court for payment of money in respect of an equitable liability (*d*), or on an equitable debt, *e.g.*, a liability arising from the equitable assignment of a debt (*e*). The same principle applies to a similar judgment or order of the King's Bench Division (*f*).

Amount secured by bill is payable at time certain.

68. If bills are given for the price of goods purchased, and have not matured, nevertheless, in the event of the commission of an act of bankruptcy by the acceptor, the price is a debt payable immediately, for although the giving of bills suspends the cause of action on the original debt, yet a subsequent act of bankruptcy puts an end to the suspension and determines the period of credit (*g*). The holder of a bill of exchange, payable three months after date, can, on the commission of an act of bankruptcy by the acceptor, present a petition against him although the time for payment has not arrived, and although there is an agreement for the renewal of the bill on the payment of interest (*h*).

Solicitor's bill.

A solicitor is a good petitioning creditor in respect of his costs although he has not delivered his bill, and although he could not bring an action till the expiration of one month after delivery (*i*), but the common practice in such a case is to stay proceedings on the petition till delivery or taxation (*k*).

debt after petition, see *Ex parte Boss, Re Whalley* (1874), L. R. 18 Eq. 375; *Ex parte Brigstocke, Re Brigstocke* (1877), 4 Ch. D. 348.

(*t*) *Re King and Beesley, Ex parte King and Beesley*, [1895] 1 Q. B. 189.

(*a*) 32 & 33 Vict. c. 71.

(*b*) *Ex parte Blencowe, Re Blencowe* (1866), 1 Ch. App. 393.

(*c*) 36 & 37 Vict. c. 66, ss. 24, 89.

(*d*) See R. S. C., Ord. 42, r. 3; *Ex parte Moore, Re Faithfull* (1885), 14 Q. B. D. 627; and *Ex parte Jones, Re Jones* (1881), 18 Ch. D. 109, *per* LUSH, L.J., at p. 125.

(*e*) See *Ex parte Cooper* (1875), L. R. 20 Eq. 762 (under the Bankruptcy Act, 1869 (32 & 33 Vict. c. 71)); Judicature Act, 1873 (36 & 37 Vict. c. 66), s. 24. But see *Ex parte Jones, Re Jones, supra, per* JESSEL, M.R., at p. 120.

(*f*) Judicature Act, 1873 (36 & 37 Vict. c. 66), s. 24; R. S. C., Ord. 42, r. 24.

(*g*) *Re Raatz, Ex parte Raatz*, [1897] 2 Q. B. 80. As to the effect of a creditor taking a bill of exchange for the amount of his judgment debt, see note (*f*), p. 28, *ante*.

(*h*) *Re Barr, Ex parte Wolfe*, [1896] 1 Q. B. 616.

(*i*) *Ex parte Sutton* (1805), 11 Ves. 163; *Ex parte Steele* (1809), 16 Ves. 162; *Ex parte Howell* (1812), 1 Rose, 312; *Ex parte Ford, Re Ford* (1838), 3 Deac. 494. See *Ex parte Peacock, Re Duffield* (1873), 8 Ch. App. 682; *Ex parte Ditton, Re Woods* (1880), 13 Ch. D. 318.

(*k*) See title SOLICITORS.

SUB-SECT. 3. Petitioning Creditor's Debt.

Time for presentation of petition.

69. The act of bankruptcy on which the petition is founded must have occurred within three months before the presentation of the petition (*l*). In the computation of time "month" means calendar month (*m*), and the day on which the petition was presented is to be excluded (*n*).

The petition may be presented on the same day that an act of bankruptcy is committed (*o*).

The petition is presented when it is received and put on the file of the court (*p*).

Domicile of debtor.

70. A petition will not be good, unless the debtor is domiciled in England, or within a year before the date of the presentation of the petition has ordinarily resided or had a dwelling-house or place of business in England (*q*).

Foreign debtors.

This provision does not affect the general law as to the liability of foreigners to the bankruptcy law of England (*r*). Therefore, if a debtor who is a foreigner does not commit an act of bankruptcy in England, it is immaterial whether he is within the provisions of the Act relating to domicile, but if he does commit an act of bankruptcy in England, then the question whether or not he also comes within these provisions as to domicile is material (*s*). "England" in this connection means England not only as opposed to foreign countries and to the colonies, but also as opposed to Scotland or Ireland (*t*). The onus of proving that the debtor satisfies this provision as to domicile is on the petitioning creditor, but he need not be prepared with evidence of the debtor's domicile in the first instance, unless he has reason to believe that there is a dispute as to it (*a*).

(*l*) Bankruptcy Act, 1883 (46 & 47 Vict. c. 52), s. 6 (1) (c). The Court will not amend a petition by adding other creditors as petitioners, if three months have elapsed from the act of bankruptcy on which the petition is founded (*Re Maund, Ex parte Maund*, [1895] 1 Q. B. 194). As to computation of time, see Bankruptcy Act, 1883, s. 141; Bankruptcy Rules, r. 4 (2).

(*m*) Interpretation Act, 1889 (52 & 53 Vict. c. 63), s. 3.

(*n*) *Re Hanson, Ex parte Forster* (1887), 4 Morr. 98. Thus, if an act of bankruptcy is committed on August 13, a petition presented on November 13 following is in time (*ibid.*). See also *Re Maud, Ex parte Townend* (1891), 8 Morr. 144; *Re Dawes, Ex parte Official Receiver* (1897), 4 Mans. 117. Where the act of bankruptcy relied on is the failure to comply with a bankruptcy notice, the petition may be presented immediately upon the expiration of the seven days required for such compliance (*Re Maud, Ex parte Townend, supra*). See also p. 32, *ante*.

(*o*) *Re Haynes, Ex parte Kibble* (1890), 7 Morr. 50; *Wydown's Case* (1807), 14 Ves. 80; *Ex parte Dufrene* (1812), 1 Rose, 333.

(*p*) *Re Cripps, Ross & Co., Ex parte Ross* (1888), 5 Morr. 226, *per* CAVE, J., at p. 229. See p. 47, *post*.

(*q*) Bankruptcy Act, 1883 (46 & 47 Vict. c. 52), s. 6 (1) (d).

(*r*) See p. 9, *ante*.

(*s*) *Re Pearson, Ex parte Pearson*, [1892] 2 Q. B. 263; *Re Clark, Ex parte Beyer, Peacock & Co.*, [1896] 2 Q. B. 476; *Cooke* v. *Charles A. Vogeler Co.*, [1901] A. C. 102. As to the position of foreigners in regard to the English bankruptcy law, see p. 9, *ante*.

(*t*) *Ex parte Cunningham, Re Mitchell* (1884), 13 Q. B. D. 418.

(*a*) *Ex parte Barne, Re Barne* (1886), 16 Q. B. D. 522; *Re Duleep Singh, Ex parte Cross* (1890), 7 Morr. 228.

SUB-SECT. 3. Petitioning Creditor's Debt.

Debtor not domiciled in England.

Even if a debtor is not domiciled in England, a petition may be presented against him if within a year before the date of the presentation of the petition he has ordinarily resided or had a dwelling-house or place of business in England (*b*). The time during which he has "ordinarily resided" or "had a dwelling-house or place of business" in England need not be the whole of the year before the date of the petition, but must be within the year (*c*).

Meaning of "ordinarily resided."

A foreigner who has a room at an hotel in London for eighteen months before the presentation of the petition, and pays for the room continuously during that time, has "ordinarily resided" in England during the required time (*d*). A Scotsman who pays several visits to London during the required period, and who, when in London, has a bedroom in a lodging-house, where he sleeps at intermittent times, cannot be said to have "ordinarily resided" in England during the required period (*e*).

"Had a dwelling-house."

If a foreigner takes rooms in a house in London and occupies them exclusively for three months during the required period, living there with his wife and servants, but paying frequent visits to his home abroad, whither he returns at the end of the three months, he has "had a dwelling-house" in England during the required period (*f*).

If within the year the debtor has had a dwelling-house in England, no time is limited during which he must have dwelt in it. If he is not a mere passing or casual visitor, he has got such a hold on this country as to make him liable to its bankruptcy laws (*g*). But where a debtor who has formerly lived in a house of his own in England goes to live abroad and abandons the house as his residence more than a year before the presentation of the petition, and does not again adopt it as his residence and live in it, though he might at any time during the year, had he chosen to do so, have gone to live there, he cannot be considered to have had a dwelling-house in England during the prescribed period (*h*).

Secured creditors.

71. If the petitioning creditor is a secured creditor, he must, in his petition, either state that he is willing to give up his security for the benefit of the creditors in the event of the debtor being adjudged bankrupt, or give an estimate of the value of his security. In the latter case he may be admitted as a petitioning creditor to

(*b*) In *Re Artola Hermanos, Ex parte André Châle* (1890), 24 Q. B. D. 640, it was held that the court had jurisdiction to entertain a petition and grant a receiving order against a firm of Chilian subjects the head offices of which were in Paris, but which had a branch establishment in England, and two of the five members of which resided in England.

(*c*) *Re Hecquard, Ex parte Hecquard* (1889), 24 Q. B. D. 71, *per* Lord ESHER, at p. 74.

(*d*) *Re Norris, Ex parte Reynolds* (1888), 5 Morr. 111.

(*e*) *Re Erskine, Ex parte Erskine* (1893), 10 T. L. R. 32.

(*f*) *Re Hecquard, Ex parte Hecquard, supra.*

(*g*) *Ibid.* at p. 74.

(*h*) *Re Nordenfelt, Ex parte Maxim-Nordenfelt Guns and Ammunition Co.*, [1895] 1 Q. B. 151.

SUB-SECT. 3. Petitioning Creditor's Debt.

the extent of the balance of the debt due to him, after deducting the value so estimated, in the same manner as if he were an unsecured creditor (*i*).

Definition.

A secured creditor is a person holding a mortgage charge or lien on the property of the debtor, or any part thereof, as a security for a debt due to him from the debtor (*k*). The mortgage or other charge, the holding of which constitutes a person a secured creditor, must be a mortgage or charge on the property of the debtor. A security on the property of a third person, even though it be for the same debt, does not constitute the holder a secured creditor (*l*).

Extent of definition.

The holder of bills of lading and of a bill of exchange accepted by the consignee of goods for sale "on the delivery up of the bills of lading" is a secured creditor of the acceptor (*m*).

When the debtor, being defendant in an action brought by the creditor, pays money into court, either voluntarily or pursuant to an order under R. S. C., Ord. 14, giving conditional leave to defend, and afterwards becomes bankrupt, the payment into court makes the creditor a secured creditor (*n*); but a judgment creditor who has obtained an order for the appointment of a receiver over the property of the debtor is not a secured creditor (*o*).

Persons not within the definition.

A creditor who has obtained a sequestration order against the property of the debtor is not a secured creditor, even though the debtor's goods have been seized or money paid into court to the account of the sequestrators (*p*); nor does a creditor who has attached the goods of his debtor in an action in the Tolzey Court of Bristol (*q*) or in the Mayor's Court of London (*r*) become a secured creditor.

An executor's right to retain a debt due to himself does not make him a secured creditor (*s*).

A landlord whose rent is in arrear is not a secured creditor simply because he has a power of distress (*t*).

A limited company, not being bound to recognise trusts of shares, is not a secured creditor of a debtor who has obtained against one

(*i*) Bankruptcy Act, 1883 (46 & 47 Vict. c. 52), s. 6 (2).

(*k*) *Ibid.*, s. 168 (1).

(*l*) *Ex parte West Riding Union Banking Co., Re Turner* (1881), 19 Ch. D. 105 *Re Hallett & Co., Ex parte Cocks, Biddulph & Co.*, [1894] 2 Q. B. 256; *Re G. Hodges, Ex parte Matthews* (1896), 3 Mans. 329.

(*m*) *Ex parte Brett, Re Howe* (1871), 6 Ch. App. 838.

(*n*) *Re Gordon, Ex parte Navalchand*, [1897] 2 Q. B. 516; *Re Ford, Ex parte the Trustee*, [1900] 2 Q. B. 211.

(*o*) *Re Dickenson, Ex parte Charrington & Co.* (1888), 6 Morr. 1; *Re Tillett, Ex parte Kingscote* (1889), 6 Morr. 70; *Re Potts, Ex parte Taylor & Sons* (1893), 10 Morr. 52.

(*p*) *Re Hastings, Ex parte Brown* (1892), 9 Morr. 234; *Re Pollard, Ex parte Pollard*, [1903] 2 K. B. 41.

(*q*) *Ex parte Sear, Re Price* (1881), 17 Ch. D. 74. See title COURTS.

(*r*) *Levy* v. *Lovell* (1880), 14 Ch. D. 234. See further, title COURTS.

(*s*) *Lee* v. *Nuttall* (1879), 12 Ch. D. 61.

(*t*) *Thomas* v. *Patent Lionite Co.* (1881), 17 Ch. D. 251, *per* JESSEL, M.R., at p. 257. A landlord cannot distrain and prove for the same rent (*Ex parte Grove* (1747), 1 Atk. 104); and see p. 291, *post*. See also title LANDLORD AND TENANT.

SUB-SECT. 3. Petitioning Creditor's Debt.

of the shareholders of the company a judgment declaring that the shareholder is a trustee of some of the shares for the debtor (*u*).

Estimate of value of security.

When a secured creditor presents a bankruptcy petition against a debtor, it is not for the court on the hearing of the petition to determine whether the estimate placed by him on the value of his security is a true estimate (*x*). If the estimate is a genuine one, the court will not inquire into its correctness, although the result of the inquiry might be to show that the unsecured balance of the debt was not sufficient to support the petition. When the petitioning creditor comes in to prove in the bankruptcy, he will not be allowed, in the absence of evidence of mistake as to value, to depart from his estimate (*a*).

Redemption of security by trustee.

The trustee is not entitled to redeem the petitioning creditor's security at the value he places on it in his petition, except when he has proved for the purpose of voting or for the purpose of ranking for a dividend (*b*).

SUB-SECT. 4.—*Debtor's Petition.*

Requisites for debtor's petition.

72. A debtor may present a petition against himself asking that a receiving order may be made in respect of his estate, and that he may be adjudged bankrupt (*c*). The petition must allege that the debtor is unable to pay his debts (*d*), and the presentation of the petition is to be deemed an act of bankruptcy without the previous filing of any declaration of inability to pay his debts, and the court may thereupon make a receiving order (*e*).

Abuse of process of the Court.

When the presentation of the petition is an abuse of the process of the court, the court may decline to make any order on it, or may rescind a receiving order made on the petition (*f*). Thus, where a debtor who is an undischarged bankrupt makes a practice of incurring credit and then presenting his own petition for the sake

(*u*) *Re Perkins, Ex parte Mexican Santa Barbara Mining Co.* (1890), 24 Q. B. D. 613.

(*x*) *Ex parte Taylor, Re Lacey* (1884), 13 Q. B. D. 128; *Re Button, Ex parte Voss*, [1905] 1 K. B. 602.

(*a*) *Re Vautin, Ex parte Saffery*, [1899] 2 Q. B. 549. If the petitioning creditor omits to state or value his security, the petition may be amended (*Ex parte Vanderlinden, Re Pogose* (1882), 20 Ch. D. 289).

(*b*) *Re Vautin, Ex parte Saffery*, [1899] 2 Q. B. 549. See p. 229, *post*. As to a debtor redeeming a security after annulment of bankruptcy, see *Pearce* v. *Bullard King & Co.* (1908), 24 T. L. R. 353.

(*c*) Bankruptcy Act, 1883 (46 & 47 Vict. c. 52), s. 4 (1) (f); Bankruptcy Rules, Appendix, Forms, No. 4.

(*d*) It was contended in one case (*Re Bullen, Ex parte Arnaud* (1888), 5 Morr. 243) that a debtor who had only one creditor was not entitled to present a bankruptcy petition against himself, but no judgment was given on this point, as it was not raised till after adjudication. See *Re Painter, Ex parte Painter*, [1895] 1 Q. B. 85.

(*e*) Bankruptcy Act, 1883 (46 & 47 Vict. c. 52), s. 8 (1). The court is not obliged to make a receiving order, in spite of the imperative word "shall" used in the section (*Re Bond* (1888), 21 Q. B. D. 17; *Re Betts, Ex parte Official Receiver*, [1901] 2 K. B. 39).

(*f*) Thus for husband and wife, if they are neither partners nor joint traders and have no joint assets or liabilities, to present a joint petition for the sake of avoiding the payment of the additional court fee which would be payable on separate petitions is an abuse of the process of the court. The proper order to make in such a case is to strike out the name of one of the joint petitioners (*Re Bond* (1888), 21 Q. B. D. 17).

SUB-SECT. 4. Debtor's Petition.

of evading committal orders against him upon judgment summonses, the presentation of a petition in such circumstances is an abuse of the process of the court, and no receiving order will be made, or if an order be inadvertently made, it will be rescinded (*g*). But the mere fact that a debtor presents a petition for the sake of getting rid of a committal order under a judgment summons is not sufficient to constitute an abuse of the process of the court, it being the intention of the Legislature in a proper case to enable a debtor to relieve himself from the pressure of a committal order by obtaining an adjudication in bankruptcy against himself (*h*).

Lunatics.

A lunatic so found by inquisition may through his committee, under the direction of the judge in lunacy, present a petition against himself (*i*) ; and the court may in the case of a lunatic not so found by inquisition appoint a person to present a bankruptcy petition on behalf of a lunatic debtor against himself (*k*), or to file a declaration of insolvency on behalf of the lunatic and consent to a receiving order being made (*l*).

Withdrawal.

73. A debtor's petition cannot after presentment be withdrawn without the leave of the court (*m*).

Death of debtor.

If a debtor dies after presenting his petition, the proceedings may be continued against his estate (*n*).

SUB-SECT. 5.—*Procedure on Petition and Orders thereon.*

Court to which petition is presented.

74. The court to which a bankruptcy petition must be presented is the High Court or a county court (*o*). If the debtor against or by whom the petition is presented has resided or carried on business (*p*) within the London bankruptcy district (*q*) for the greater part of the six months immediately preceding the presentation of the petition, or for a longer period during those six months than in the district of any county court, or is not resident in England, or if the petitioning creditor is unable to ascertain his residence, the petition must be presented to the High Court (*r*). In any other case the petition must be presented to the county

(*g*) *Re Betts, Ex parte Official Receiver*, [1901] 2 K. B. 39.

(*h*) *Re Painter, Ex parte Painter*, [1895] 1 Q. B. 85; *Re Hancock*, [1904] 1 K. B. 585; *Re Archer, Ex parte Archer* (1904), 20 T. L. R. 390.

(*i*) *Re James* (1884), 12 Q. B. D. 332. See *Re Farnham*, [1895] 2 Ch. 799, at p. 810.

(*k*) Bankruptcy Rules, r. 271 A. This meets the case of *Ex parte Cahen, Re Cahen* (1879), 10 Ch. D. 183, which decided before the Act of 1883 that no one could do such an act on behalf of a lunatic not so found by inquisition.

(*l*) *Re R. S. A.*, [1901] 2 K. B. 32.

(*m*) Bankruptcy Act, 1883 (46 & 47 Vict. c. 52), s. 8 (2).

(*n*) *Re Walker* (1886), 3 Morr. 69.

(*o*) Bankruptcy Act, 1883 (46 & 47 Vict. c. 52), s. 92 (1). And see p. 37, *ante*.

(*p*) A debtor who is employed as a clerk in a bank within the London district "carries on business" within the district of the Court (*Ex parte Breull, Re Bowie* (1880), 16 Ch. D. 484). *Semble* that, for the purposes of bankruptcy jurisdiction, he also "resides" there, although his house is outside the district (*ibid.*).

(*q*) *I.e.*, the city of London and its liberties and all places within the districts of the county courts of Bloomsbury, Bow, Brompton, Clerkenwell, Lambeth, Marylebone, Shoreditch, Southwark, Westminster, and Whitechapel (Bankruptcy Act, 1883 (46 & 47 Vict. c. 52), s. 96, Sched. III.).

(*r*) *Ibid.*, s. 95 (1).

SUB-SECT. 5. Procedure on Petition.

court of the district in which the debtor has resided or carried on business for the longest period during the six months immediately preceding the presentation of the petition (*s*).

If the debtor during the specified period has carried on business within the district of one court, and resided within the district of another court, the petition is to be presented to the court within the district of which he has carried on business (*t*).

A petition is not invalidated by reason of its being presented to a wrong court, and if presented there, the court to which it is presented may make a receiving order and transfer the proceedings to the right court (*a*).

Form of petition.

75. A bankruptcy petition must be fairly written or printed, or partly written and partly printed, and no alterations, interlineations, or erasures are to be made without the leave of the registrar, except so far as may be necessary to adapt a printed form to the circumstances of the particular case (*b*). It must be in one of the forms which are prescribed by the Bankruptcy Rules, with such variations as circumstances may require (*c*). The court may amend it upon such terms, if any, as it may think fit to impose (*d*).

Non-compliance with rules.

Non-compliance with the rules or with any rule of practice for the time being in force does not render any proceeding void unless the court so directs, but such proceeding may be set aside, either wholly or in part, as irregular, or amended or otherwise dealt with in such manner and upon such terms as the court may think fit (*e*).

Creditor's petition.

76. A creditor's petition is intituled as follows: "In the High Court of Justice" (or "In the County Court of , holden at "), "In bankruptcy." It must contain the number of the petition and the year of issue and be headed "*Re* " (here follows the name of the debtor (*f*)) "*Ex parte* " (here follows the name of the petitioning creditor (*g*)).

(*s*) Bankruptcy Act, 1883 (46 & 47 Vict. c. 52), s. 95 (2). Where a receiving order has been made on a bankruptcy petition against or by one member of a partnership, any other bankruptcy petition against or by a member of the same partnership must be filed in or transferred to the court in which the first-mentioned petition is in course of prosecution (*ibid.*, s. 112).

(*t*) Bankruptcy Rules, r. 145.

(*a*) *Ex parte May, Re Brightmore* (1884), 14 Q. B. D. 37. See *Re Strick, Ex parte Martin* (1886), 3 Morr. 78; *Re French, Ex parte French* (1889), 24 Q. B. D. 63; and, as to transfer, Bankruptcy Act, 1883 (46 & 47 Vict. c. 52), s. 97 (2); Bankruptcy Rules, rr. 18—25.

(*b*) Bankruptcy Rules, r. 143; and compare r. 11.

(*c*) *Ibid.*, Appendix, Forms, No. 10 (creditor's petition); No. 4 (debtor's petition).

(*d*) Bankruptcy Act, 1883 (46 & 47 Vict. c. 52), s. 105 (3). The court will not amend a petition by adding other creditors as petitioners after three months from the act of bankruptcy on which the petition is founded (*Re Maund, Ex parte Maund*, [1895] 1 Q. B. 194).

(*e*) Bankruptcy Rules, r. 350. See Bankruptcy Act, 1883 (46 & 47 Vict. c. 52), s. 143 (1).

(*f*) As to the title of bankruptcy proceedings, see Bankruptcy Rules, r. 10, Appendix, Forms, No. 1. If the debtor has been trading under an assumed name, both the real and assumed names may be given (*Re Myles, Ex parte Myles* (1891), 8 Morr. 255). As to bankruptcy proceedings taken against a partner in the name of the firm, see p. 12, *ante*.

(*g*) If an incorporated company is the petitioning creditor, even though the

SUB-SECT. 5. Procedure on Petition.

It begins by setting out the name and address of the petitioning creditor or creditors, and asks that a receiving order may be made in respect of the estate of the debtor whose description and address at the date of the petition are set out. If the debtor, at the time of the petition, is residing or carrying on business at an address other than the one at which he was residing or carrying on business when he contracted the debt or liability in respect of which the petition is presented, the address at which he was residing or carrying on business when the liability was incurred must also be set out (*h*).

Names and addresses.

The petition next alleges that the debtor has for the greater part of six months next preceding the presentation of the petition resided or carried on business at a certain named place within the jurisdiction of the court, or as the case may be; that he is justly and truly indebted to the creditor or to the creditors in the aggregate in the sum of £ , being the amount of the debt, the consideration for which must be stated.

Jurisdiction and debt.

It then alleges either that the creditor does not hold any security on the debtor's estate, or that he holds security, in which case he must either state that he is willing to give it up in the event of the debtor's being adjudged bankrupt, or name the sum at which he estimates the value of the security.

Security.

The petition further alleges that the debtor within three months before the date of the presentation of the petition committed an act or acts of bankruptcy, the nature and date or dates of which must be set out (*i*).

Act of bankruptcy.

Then follows the date of the petition. The petition must be signed by the petitioning creditor or creditors (*k*), and must be attested. In England the attestation must be by a solicitor or justice of the peace, or an official receiver or registrar of the court, out of England by a judge, or magistrate, or British consul or vice-consul, or notary public (*l*).

Date and signatures.

77. A debtor's petition is headed in the same way as the creditor's petition except that it does not contain the name of a creditor. It

Debtor's petition.

petition is presented by a liquidator, the heading should be "Ex parte the Company" (*Re Shirley, Ex parte Mackay* (1887), 58 L. T. 237; *Re Bassett, Ex parte Lewis* (1895), 2 Mans. 177).

(*h*) Bankruptcy Rules, r. 144 (2).

(*i*) The date of the act of bankruptcy should be stated, but if the date is omitted, there is power to allow the petition to be amended and the date inserted (*Re Dunhill, Ex parte Wilson* (1894), 1 Mans. 242); in general, however, a petition which does not state the date of the act of bankruptcy will not be received until the date is supplied. If the act of bankruptcy consists of the debtor absenting himself from his place of business, it must be alleged that such absenting was with intent to defeat or delay creditors; if this allegation is omitted, it may be inserted by amendment (*Re Fiddian, Squire & Co., Ex parte Fiddian, Squire & Co.* (1892), 9 Morr. 95), but this cannot be done after adjudication (*Ex parte Coates, Re Skelton* (1877), 5 Ch. D. 979).

(*k*) It may be signed on behalf of the creditor by a duly constituted attorney (*Ex parte Wallace, Re Wallace* (1884), 14 Q. B. D. 22). In the case of a company the petition may be signed by an officer duly authorised under the company's seal (see p. 35, *ante*), and in the case of a firm by one of its members (Bankruptcy Act, 1883 (46 & 47 Vict. c. 52), s. 148; Bankruptcy Rules, r. 259).

(*l*) Bankruptcy Rules, r. 146. An irregular attestation can be amended (*Re a Debtor* (1902), 86 L. T. 688).

SUB-SECT. 5. Procedure on Petition.

must contain the name, address, and description, of the debtor, and if he resides at a place other than his place of business must give both addresses. If unsatisfied debts or liabilities have been incurred at other addresses, such addresses must also be mentioned. It states that he has for the greater part of the past six months resided or carried on business at a named place within the district of the court to which the petition is presented, and asks that, as he is unable to pay his debts, a receiving order may be made in respect of his estate, and that he may be adjudged bankrupt. It is signed, dated, and attested in the same way as a creditor's petition (*m*).

Order on debtor's petition.

When it is presented, the court must forthwith make a receiving order (*n*), unless it appears to the court that the petition is not a proper one, in which case the court may refuse to make a receiving order (*o*).

Security for costs.

78. A petitioning creditor who is resident abroad or whose estate is vested in a trustee under any law relating to bankruptcy, or against whom a petition is pending, or who has made default in payment of any costs ordered by any court to be paid by him to the debtor, may be ordered to give security for costs to the debtor (*p*).

Verification of petition.

79. Every creditor's petition must be verified by an affidavit of the creditor or of some person on his behalf having knowledge of the facts (*q*); and, when it is filed, two or more copies must be lodged with it to be sealed and issued to the petitioner (*r*). Where the petitioning creditor cannot himself verify all the statements in the petition, he must file in support of the petition an affidavit by some person who can depose to them (*s*). Where a petition is presented by two or more creditors jointly, each creditor need not depose to the truth of all the statements which are within his own knowledge, but it is sufficient that each statement is deposed to by someone within whose knowledge it is (*t*).

Investigation of petition.

After the presentation of a creditor's petition and before sealing the copies for service, the statements in the petition must be investigated by the registrar of the court to which the petition is presented; and where some of the statements cannot be verified by affidavit, witnesses may be summoned to prove them (*a*).

(*m*) Bankruptcy Rules, r. 144 (1), Appendix, Forms, No. 4. As to signature in the name of a firm, see *ibid*, r. 261.

(*n*) *Ibid.*, r. 157 (1).

(*o*) *Re Bond and Bond, Ex parte Official Receiver* (1888), 5 Morr. 146, *per* CAVE, J., at p. 150.

(*p*) Bankruptcy Rules, r. 148. For the mode of giving security, see rr. 38—46.

(*q*) Bankruptcy Act, 1883 (46 & 47 Vict. c. 52), s. 7 (1). For forms, see Bankruptcy Rules, Appendix, Forms, Nos. 12, 13.

(*r*) Bankruptcy Rules, r. 149. On the presentation of a petition either by a debtor or a creditor a stamp fee of £5 must be paid, and the further sum of £5 deposited (*ibid.*, r. 147; Order as to Fees and Percentages (18 and 19 December, 1890), Table A). Where on a debtor's petition the official receiver gives a certificate that there is reasonable ground for believing that the assets are sufficient to meet the expenses of administration, the stamp fee of £5 is not charged (*ibid.*).

(*s*) Bankruptcy Rules, r. 150.

(*t*) *Ibid.*, r. 151.

(*a*) *Ibid.*, r. 152. This is most commonly done where the alleged act of bankruptcy is absconding by the debtor, in which case it is the common practice

SUB-SECT. 5. Procedure on Petition.

80. A creditor's petition must be personally served by delivering to the debtor a sealed copy of the filed petition (*b*). It must be served by an officer or bailiff of the court, or by the creditor or his solicitor, or by some person in their employ (*c*).

Service of petition.

If personal service cannot be effected, the court may extend the time for hearing the petition, or if satisfied by evidence on oath that the debtor is keeping out of the way to avoid service, or that for any other cause prompt personal service cannot be effected, may order substituted service by delivery of the petition to some adult inmate (*d*) at the debtor's usual or last known residence or place of business, or by registered letter, or in such other manner as the court may direct (*e*).

Substituted service.

If the debtor dies after the filing (*f*) of a creditor's petition and before service, the court may order service to be effected on his personal representatives, or on such other persons as the court may think fit (*g*); and the proceedings in the matter are, unless the court otherwise orders, continued as if he were alive (*h*).

Death of debtor before service.

81. The hearing of a creditor's petition takes place before the registrar of the court to which it is presented (*i*), and the registrar appoints the time and place at which it is to be heard, notice of such time and place being written on the petition and sealed copies (*k*).

Hearing of petition.

A creditor's petition must not be heard until the expiration of

to examine witnesses *ex parte* before the registrar in order to verify the act of bankruptcy.

(*b*) Bankruptcy Act, 1883 (46 & 47 Vict. c. 52), s. 7 (1); Bankruptcy Rules, r. 153. If there are more respondents than one, they must be all served (*ibid.*, r. 159). As to service on a firm, see *ibid.*, r. 260. As to proof of service, see *ibid.*, r. 155; Appendix, Forms, No. 15.

(*c*) The person need not be in the permanent employ of the creditor or solicitor (*Re Blackman, Ex parte Branfill* (1892), 9 Morr. 157).

(*d*) *Re Evance, Ex parte Evance* (1893), 10 Morr. 146.

(*e*) Bankruptcy Rules, r. 154. In *Re Collinson, Ex parte Collinson* (1887), 4 Morr. 161, substituted service was ordered by directing that publication of a notice in the *London Gazette* and the *Times* should be deemed to be good service of the petition. An order for substituted service may be made, although the debtor is out of the jurisdiction, if the court is satisfied that he went out of the jurisdiction to avoid service (*Re Urquhart, Ex parte Urquhart* (1890), 24 Q. B. D. 723). Compare Bankruptcy Rules, r. 156. As to the form of order for substituted service, see Bankruptcy Rules of 23 November, 1901, r. 2; Bankruptcy Rules, Appendix, Forms, No. 16 A.

(*f*) The petition is filed when it is delivered by a properly authorised person to the proper officer at the proper place, with intent that it should be filed or placed upon record in the ordinary manner (*Ransford* v. *Maule* (1873), L. R. 8 C. P. 672, *per* KEATING, J., at p. 678). If a petition which is in order is so delivered, it is then filed, even though the proper officer refuse to receive it; but if a petition is not in order, *e.g.*, if it is not accompanied in the case of a petition signed under s. 148 of the Bankruptcy Act, 1883 (46 & 47 Vict. c. 52), by the proper affidavit required by r. 258 of the Bankruptcy Rules, the petition is not filed till the omission is rectified and the petition is in order (*Re Cripps, Ross & Co., Ex parte Ross* (1888), 5 Morr. 226, at p. 229).

(*g*) Bankruptcy Rules, r. 156 A. Before this rule was made it was decided that, on the death of the debtor before service, proceedings had to be discontinued (*Re Easy, Ex parte Hill and Hymans* (1887), 19 Q. B. D. 538).

(*h*) Bankruptcy Act, 1883 (46 & 47 Vict. c. 52), s. 108. See also *Re Walker* (1886), 3 Morr. 69; *Re Hardy*, [1896] 1 Ch. 904.

(*i*) Bankruptcy Act, 1883 (46 & 47 Vict. c. 52), s. 99 (2) (a).

(*k*) Bankruptcy Rules, r. 158. For the case of several respondents, see r. 159.

SUB-SECT. 5. Procedure on Petition.

eight days from service, or at such earlier date as the court may order in cases where the act of bankruptcy alleged is that the debtor has filed a declaration of inability to pay his debts or where it is proved that he has absconded, or in any other case for good cause shown (*l*). Where the petition has not been served, the registrar may from time to time alter the day first appointed and appoint another day and hour (*m*).

Debtor showing cause against petition.

A debtor intending to show cause against a petition which has been served on him must file a notice with the registrar specifying the statements in the petition which he intends to deny or dispute, and he must transmit by registered letter (*n*) to the petitioning creditor and his solicitor, if known, a copy of the notice three days before the day on which the petition is to be heard (*o*).

Dismissal of petition.

If on the hearing of a petition it appears that it has not been served on the debtor, or if the petitioning creditor does not appear, the petition may be dismissed (*p*).

Non-appearance of debtor or creditor.

If the debtor does not appear, the court may make a receiving order on such proof of the statements in the petition as the court shall think sufficient (*q*). The petitioning creditor must attend personally, unless the court dispenses with his personal attendance (*r*).

Appearance of debtor to show cause.

If the debtor appears to show cause against the petition, evidence must be given of the petitioning creditor's debt and the act of bankruptcy or such of those matters as the debtor shall have given notice that he intends to dispute (*s*).

Evidence at hearing.

The affidavit filed with the petition cannot be used at the hearing (*t*). The petitioning creditor is entitled to the production of the debtor's books for the purpose of proving the allegations in the petition, and may call the debtor himself as a witness in support of the petition (*u*).

(*l*) Bankruptcy Rules, r. 157 (2).

(*m*) See note (*k*), p. 51, *ante*.

(*n*) Bankruptcy Rules, r. 92.

(*o*) *Ibid.*, r. 160; as to form of notice, see *ibid.*, Appendix, Forms, No. 17.

(*p*) *Re Stockley, Ex parte Discount Co.* (1893), 10 Morr. 131; Bankruptcy Rules, r. 163. As to application for extension of time for hearing of petition, see *ibid.*, rr. 167, 168. If any creditor neglects to appear on his petition, no subsequent petition against the same debtor or debtors, or any of them, either alone or jointly with any other person, can be presented by the same creditor without the leave of the court to which the previous petition was presented (*ibid.*, r. 163).

(*q*) *Ibid.*, r. 161. Evidence must be given of the petitioning creditor's debt, the service of the petition, and of the act or one of the acts of bankruptcy alleged (Bankruptcy Act, 1883 (46 & 47 Vict. c. 52), s. 7 (2)). The petitioning creditor's debt must be proved to have existed, not only at the time of the petition and act of bankruptcy, but at the date of the hearing and when the receiving order is made (*Re Stables, Ex parte Smith & Sons* (1894), 1 Mans. 68; *Re Winby, Ex parte Winby* (1886), 3 Morr. 108). Evidence may be given either *viva voce* or upon affidavit (Bankruptcy Act, 1883 (46 & 47 Vict. c. 52), s. 105 (5)). The accidental absence of the debtor or his adviser is a ground for rehearing (*Ex parte Phillips, Re Phillips* (1874), 44 L. J. (BCY.) 11).

(*r*) Bankruptcy Rules, r. 164; *Re Purrett, Ex parte Purrett* (1895), 2 Mans. 403; *Ex parte Rayner, Re Rayner* (1877), 37 L. T. 38.

(*s*) Bankruptcy Rules, r. 162.

(*t*) *Ex parte Lindsay, Re Lindsay* (1874), L. R. 19 Eq. 52; *Ex parte Rogers, Re Rogers* (1880), 15 Ch. D. 207. The evidence used on the hearing of proceedings on the bankruptcy notice cannot be used (*ibid.*).

(*u*) *Re X. Y., Ex parte Haes*, [1902] 1 K. B. 98.

SUB-SECT. 5. Procedure on Petition.

Adjournment of hearing.

82. If any new evidence is given as to the matters which are in dispute, or if any witness to such matter is not present for cross-examination, and further time is desired to show cause against the petition, the court may grant further time (*a*). The court has a general power to adjourn the hearing of a petition on such terms as it may think fit to impose (*b*), but after the expiration of one month from the day appointed for the first hearing of a petition, if duly served, no further adjournment merely by consent of parties is to be allowed, except for the reasons set forth above, or for such other sufficient reason, to be stated in the order for adjournment, as the court shall think fit; but in every such case, unless an order for adjournment is made, the court must either make a receiving order or dismiss the petition (*c*).

Orders on petition.

83. On the hearing of a petition the court may either dismiss the petition, or make a receiving order, or dismiss the petition as against one or more respondents and make a receiving order as against others (*d*).

Stay of proceedings.

Where the act of bankruptcy relied on is non-compliance with a bankruptcy notice, the court may stay or dismiss the petition on the ground that an appeal is pending from the judgment (*e*).

The court may also stay proceedings for such time as may be required for trial of a disputed debt where the debtor appears on the petition and denies that he is indebted to the petitioner, or that he is indebted to such an amount as would justify the petitioner in presenting a petition against him. In such a case the court may require him to give security for payment to the petitioner of any debt which may be established against him in due course of law, and of the costs of establishing it (*f*).

(*a*) Bankruptcy Rules, r. 162. An application for an adjournment on the first day appointed for the sake of considering an offer to settle the petitioning creditor's debt ought to be granted (*Re Farleigh* (1905), 21 T. L. R. 198).

(*b*) Bankruptcy Act, 1883 (46 & 47 Vict. c. 52), s. 105 (2). There is no power to adjourn the hearing of a petition to see whether an arrangement with creditors to which the petitioning creditor has not assented will work well for the benefit of all the creditors (*Ex parte Oram, Re Watson* (1885), 15 Q. B. D. 399).

(*c*) Bankruptcy Rules, r. 169. Evidence may be required on an adjournment that the debt is still due at the time of the hearing, but it is sufficient if the petitioning creditor gives *vivâ voce* evidence as to this (*Re Stables, Ex parte Smith & Sons* (1894), 1 Mans. 68), or the parties may consent that no further evidence should be required (*Re Winby, Ex parte Winby* (1886), 3 Morr. 108).

(*d*) Bankruptcy Act, 1883 (46 & 47 Vict. c. 52), s. 111; Bankruptcy Rules, r. 159; *Lovell and Christmas* v. *Beauchamp*, [1894] A. C. 607 (receiving order against partners other than infant partner).

(*e*) Bankruptcy Act, 1883 (46 & 47 Vict. c. 52), s. 7 (4). It is a matter for the discretion of the registrar whether he will stay proceedings or not. The judgment debtor cannot claim a stay as of right. If the registrar, in the exercise of his discretion, refuses a stay, his decision will not be interfered with on appeal, unless the discretion was wrongly exercised (*Re French, Ex parte French* (1889), 6 Morr. 258). If the appeal appears to be *bonâ fide*, the hearing of the petition ought to be adjourned; if evidently frivolous, a receiving order ought to be made (*Ex parte Heyworth, Re Rhodes* (1884), 14 Q. B. D. 49; *Re Flatau, Ex parte Scotch Whisky Distillers, Ltd.* (1888), 22 Q. B. D. 83). If the debtor has applied to set aside the bankruptcy notice, a receiving order cannot be made until after the hearing of the application or during a stay of the proceedings on the notice (Bankruptcy Rules, r. 180).

(*f*) Bankruptcy Act, 1883 (46 & 47 Vict. c. 52), s. 7 (5). For form of order

SUB-SECT. 5. Procedure on Petition.

Where proceedings are stayed, the court may, if by reason of the delay caused by the stay or for any other cause it thinks just, make a receiving order on the petition of some other creditor and dismiss, on such terms as it thinks just, the petition that has been stayed (*g*).

The Court may at any time for sufficient reason make an order staying the proceedings under a bankruptcy petition, either altogether or for a limited time, on such terms and subject to such conditions as the Court may think just (*h*).

Substitution of another petitioning creditor.

84. Where a petitioner does not proceed with due diligence on his petition, the Court may substitute as petitioner any other creditor to whom the debtor may be indebted in the amount required by the Act in the case of the petitioning creditor (*i*).

Withdrawal of petition.

The Court may also give leave for the withdrawal of a creditor's petition after being informed of the facts and the terms of withdrawal (*k*).

Transfer etc. of proceedings.

The High Court can transfer proceedings from the High Court to a county court or from a county court to the High Court, and a county court can transfer proceedings to another county court, but not to the High Court. When two or more petitions are presented against the same debtors or against joint debtors, the court may consolidate the proceedings (*l*).

to stay, see Bankruptcy Rules, Appendix, Forms, No. 18. A question of a disputed debt may be tried by a jury (Bankruptcy Act, 1883 (46 & 47 Vict. c. 52), s. 102 (3)), but such a trial is very rare, and questions of disputed debts are in general determined by the registrar on *viva voce* evidence. The order for trial of an issue with a jury cannot be made by a registrar (*ibid.*, s. 99 (1), (2) (f); Bankruptcy Rules, r. 6 (H)).

(*g*) Bankruptcy Act, 1883 (46 & 47 Vict. c. 52), s. 7 (6). Where proceedings have been stayed, and the validity of the debt has been established by the judgment of a court of first instance, the registrar may proceed with the hearing of the petition, and is not bound to wait for a final decision of a court of appeal on the validity of the debt, but if he is satisfied that a *bonâ fide* appeal is pending, he ought to adjourn the further hearing of the petition till the appeal is disposed of (*Ex parte Yeatman, Re Yeatman* (1880), 16 Ch. D. 283. See Bankruptcy Rules, r. 165). This was also lately held in *Re Jacobs, Ex parte Booth's Distillery Co.* (not reported), where an appeal to the House of Lords against the judgment was pending, and a petition against the debtor was stayed. See the case on appeal to the House of Lords, *Jacobs* v. *Booth's Distillery Co.* (1901), 85 L. T. 262.

(*h*) Bankruptcy Act, 1883 (46 & 47 Vict. c. 52), s. 109; *Re a Debtor, Ex parte Official Receiver* (1901), 84 L. T. 666; *Ex parte Carr, Re Carr* (1886), 35 W. R. 150.

(*i*) Bankruptcy Act, 1883 (46 & 47 Vict. c. 52), s. 107. Where a creditor's petition was presented and dismissed, and a receiving order was then made on the debtor's petition, and on appeal the order dismissing the petition was reversed, the court dated back the receiving order to the date of the creditor's petition (*Re Haynes, Ex parte Kibble* (1890), 7 Morr. 50).

(*k*) Bankruptcy Act, 1883 (46 & 47 Vict. c. 52), s. 7 (7); *Re Bebro*, [1900] 2 Q. B. 316.

(*l*) Bankruptcy Act, 1883 (46 & 47 Vict. c. 52), ss. 97, 106; Bankruptcy Rules, Appendix, Forms, No. 22; *Re Strick, Ex parte Martin* (1886), 3 Morr. 78, where a petition having been presented in Swansea, the debtor's place of business, and in London, the proceedings in the London petition were transferred to Swansea; *Re Abbott*, [1894] 1 Q. B. 442, where a partnership having been dissolved and separate receiving orders made against the late partners, it was held that, as there were joint assets and liabilities still in existence, the Court could consolidate the proceedings under the separate receiving orders.

As to the rules which guide a court in directing a transfer, see *Re Linton* (1892), 8 T. L. R. 219, 377.

In *Ex parte Mackenzie, Re Helliwell* (1875), L. R. 20 Eq. 758, proceedings under

SUB-SECT. 5. Procedure on Petition.

Official receiver as interim receiver.

85. At any time after the presentation of a bankruptcy petition the court may appoint the official receiver to be interim receiver of the property of the debtor or of any part thereof, and direct him to take immediate possession of the whole or any part thereof. This may be done before a receiving order is made (*m*).

Stay of other proceedings against debtor or his property.

The court may also stay any action, execution, or other legal process against the property or person of the debtor (*n*).

Arrest of debtor and seizure of books, etc.

86. The court may cause a debtor to be arrested and any books, papers, money, and goods in his possession to be seized and safely kept in the following cases: if after the issue and service of a bankruptcy notice or presentation of a bankruptcy petition by or against him there is probable reason for believing that he has absconded or is about to abscond (*o*) with a view of avoiding payment of the debt in respect of which the bankruptcy notice was issued, or of avoiding appearance to the petition or otherwise avoiding, delaying, or embarrassing proceedings in bankruptcy against him; or if after presentation of a petition by or against him there is probable cause for believing that he is about to remove his goods to prevent or delay possession being taken by the official receiver, or that he has concealed or is about to conceal or destroy any of his goods or any books, documents, or writings which might be of use to his creditors in the course of his bankruptcy; or if after service of a petition on him he removes any goods in his possession above the value of £5 without the leave of the official receiver (*p*).

a separate petition against one of two partners were consolidated with proceedings under an adjudication in bankruptcy against both. Where a member of a partnership dies insolvent, and an order is made under s. 125 of the Bankruptcy Act, 1883 (46 & 47 Vict. c. 52), for the administration of his estate in bankruptcy, and afterwards the surviving partner becomes bankrupt, the proceedings in the two estates can be consolidated (*Re C. Greaves, Re W. H. Greaves, Ex parte Official Receiver*, [1904] 2 K. B. 493). An application to transfer a petition against one partner from the county court to the High Court where a petition is pending against the other partner should be made in the county court (*Re Nicholson, Ex parte Nicholson* (1886), 3 Morr. 46). See further, as to transfer, Bankruptcy Rules, rr. 18—20.

(*m*) Bankruptcy Act, 1883 (46 & 47 Vict. c. 52), s. 10 (1); Bankruptcy Rules, rr. 170—175; for form of application, see *ibid.*, Appendix, Forms, No. 14. An official receiver who is appointed interim receiver of the property of a firm may appoint a special manager of the business of the firm (Bankruptcy Act, 1883 (46 & 47 Vict. c. 52), s. 12 (1)), and in the event of the petition being dismissed the special manager is entitled to be reimbursed out of the receipts of the business his expenses and his remuneration (*Re A. B. & Co.* (No. 2), [1900] 2 Q. B. 429). As to special manager, see p. 76, *post.* If the petition is afterwards dismissed, the Court is upon application within twenty-one days of the dismissal to adjudicate with respect to any damages or claim arising out of the appointment of an interim receiver (Bankruptcy Rules, r. 175). Such an application is rarely made. In *Re A. B. & Co., supra*, an application by the debtors to recover damages was made, but after being partly heard was abandoned.

(*n*) Bankruptcy Act, 1883 (46 & 47 Vict. c. 52), s. 10 (2); and see p. 62, *post.* As to service of order, see *ibid.*, s. 11; Bankruptcy Rules, r. 92, and p. 63, *post.*

(*o*) The warrant can only be issued after the issue of a bankruptcy notice or the presentation of a bankruptcy petition, but in a case in which the debtor has absconded or is about to abscond can be issued before either of these events (*Skinner* v. *County Court Judge of Northallerton*, [1898] 2 Q. B. 680).

(*p*) Bankruptcy Act, 1883 (46 & 47 Vict. c. 52), s. 25 (1) (a), (b), (c); Bankruptcy Act, 1890 (53 & 54 Vict. c. 71), s. 7. The last-mentioned offence can, it seems, only be committed before the date of a receiving order, when an official receiver is appointed interim receiver of the debtor's estate.

SUB-SECT. 5. **Procedure on Petition.**

General powers of court.

87. The court has also a general power over costs and of adjourning any proceedings, amending any written process or proceeding, and extending the time limited by the Act or the rules for doing any act (*q*).

Costs.

As regards the costs of a petition, all proceedings down to and including the making of a receiving order are at the cost of the petitioner, but where a receiving order is made the costs of the petitioning creditor, including the costs of the bankruptcy notice, if any, sued out by him, are to be taxed and payable out of the proceeds of the estate in the order of priority prescribed by the rules (*r*).

SECT. 4.—*Receiving Order.*

SUB-SECT. 1.—*Circumstances in which a Receiving Order will be made or refused.*

Object of receiving order.

88. As regards the debtor's estate, a receiving order is an order of the court of bankruptcy placing that estate under the custody and control of the court through its officer, the official receiver (*s*). As regards the debtor personally, the making of a receiving order is equivalent to a decision of the court that the debtor is to be adjudged a bankrupt, unless a composition or scheme is accepted by the creditors (*t*).

When granted in case of debtor's petition.

89. In the case of a debtor's petition, if it is in due form and complies with the prescribed conditions, a receiving order is made as a matter of course, except where the petition is an abuse of the process of the court (*u*).

In case of creditor's petition.

As regards a creditor's petition, if the creditor fails to appear on the hearing of the petition or fails to comply with the prescribed conditions and to give the necessary proof of the required facts, if they are disputed, *e.g.*, if he does not satisfy the court that he is entitled to petition, that he has a good petitioning creditor's debt, that an act of bankruptcy has been committed within the specified time before presentation of the petition, that the debtor is amenable to the English bankruptcy law, and that the petition has been duly served, the petition will be dismissed (*w*). Even if all the required conditions are complied with and all the necessary facts proved, yet the court may dismiss the petition, if it is satisfied by the debtor that he is able to pay his debts, or that for other sufficient cause no order ought to be made (*a*).

Non-compliance with bankruptcy notice.

90. Where the act of bankruptcy relied on is non-compliance with a bankruptcy notice, the court may dismiss or adjourn the

(*q*) Bankruptcy Act, 1883 (46 & 47 Vict. c. 52), s. 105.

(*r*) Bankruptcy Rules, rr. 183 (1), 125; *Re Bright, Ex parte Wingfield and Blew*, [1903] 1 K. B. 735. As to the costs of a debtor's petition, see Bankruptcy Rules, rr. 112 b, 126.

(*s*) See Bankruptcy Act, 1883 (46 & 47 Vict. c. 52), s. 70 (2).

(*t*) *Re Pinfold, Ex parte Pinfold*, [1892] 1 Q. B. 73, at pp. 75, 76.

(*u*) See p. 46, *ante*.

(*w*) Bankruptcy Act, 1883 (46 & 47 Vict. c. 52), s. 7 (3). See pp. 34, 43, *ante*; as to dismissal after the trial of the question of the validity of the petitioning creditor's debt, see Bankruptcy Rules, r. 166; after the setting aside of the bankruptcy notice, *ibid.* r. 180. For forms of order of dismissal of petition, see *ibid.*, Appendix, Forms, Nos. 25, 26.

(*a*) Bankruptcy Act, 1883 (46 & 47 Vict. c. 52), s. 7 (3).

petition on the ground that an appeal is pending from the judgment to which the notice relates (*b*).

SUB-SECT. 1. Circumstances justifying Receiving Order.

Where such an act of bankruptcy is relied on, the judgment is conclusive in the bankruptcy court, unless the consideration for it can be questioned (*c*); the court may, however, for the purpose of determining whether a receiving order should or should not be made, go behind the judgment and inquire into the consideration for it, and on finding that there was no valid or legal consideration for it, may refuse to make a receiving order (*d*). This may be done at the request of the debtor, even where the judgment was by consent, estoppel not applying as against the bankruptcy court (*e*). Even where the Court of Appeal has refused to set aside the judgment, the bankruptcy court may still go behind it and inquire into the liability on which it is founded (*f*). So if the judgment has been obtained by the compromise of an action, the bankruptcy court may none the less inquire into the consideration and reject the debt, if it finds that the compromise, though not fraudulent, was unfair and unreasonable (*g*).

Inquiry into consideration for judgment.

Further, a transaction with a money-lender may be reopened (*h*), if it is "harsh and unconscionable," even though in the action, the judgment in which is the basis of the petition, the debtor did not apply for relief (*i*).

Money-lending transaction.

But the court does not go behind the judgment simply on the suggestion of the debtor that the judgment debt is bad. There must be circumstances justifying an inquiry (*k*); there must be evidence that the judgment was obtained by fraud or collusion, or that there has been some miscarriage of justice (*l*). The fact that the judgment is irregular or wrong in form is not a sufficient reason for going behind it and dismissing the petition. If the facts alleged by the debtor as a reason for going behind the judgment are, in the opinion of the court, immaterial, it may refuse to hear evidence in support of such facts (*m*).

Reasons justifying the court in going behind judgment.

In making an inquiry as to the validity of a judgment the court is not determining whether there is a debt due, but whether a receiving order should be made. As between the parties there is a debt due; that is *res judicata*, and although it can go behind a judgment, it has no power to set it aside. If on the hearing of a petition against a judgment debtor the court inquires into the consideration and refuses to make a receiving

Effect of going behind judgment.

(*b*) Bankruptcy Act, 1883 (46 & 47 Vict. c. 52), s. 7 (4). See pp. 25—32, *ante*.
(*c*) *Re Beauchamp, Ex parte Beauchamp*, [1904] 1 K. B. 572.
(*d*) *Ex parte Kibble, Re Onslow* (1875), 10 Ch. App. 373.
(*e*) *Ex parte Lennox, Re Lennox* (1885), 16 Q. B. D. 315; *Re Beauchamp, Ex parte Beauchamp, supra*.
(*f*) *Re Fraser, Ex parte Central Bank of London* (1892), 9 Morr. 256.
(*g*) *Re Hawkins, Ex parte Troup*, [1895] 1 Q. B. 404.
(*h*) Under the Money-lenders Act, 1900 (63 & 64 Vict. c. 51), s. 1. See title MONEY AND MONEY LENDING.
(*i*) *Re a Debtor, Ex parte the Debtor*, [1903] 1 K. B. 705. See, however, *Re Attree, Ex parte Ward*, [1907] 2 K. B. 868, and p. 211, *post*.
(*k*) *Re Saville, Ex parte Saville* (1887), 4 Morr. 277.
(*l*) *Re Flatau, Ex parte Scotch Whisky Distillers* (1888), 22 Q. B. D. 83.
(*m*) *Re Lipscombe, Ex parte Lipscombe* (1887), 4 Morr. 43.

SUB-SECT. 1. Circumstances justifying Receiving Order.

order, its decision does not operate as *res judicata* with respect to the petitioning creditor's debt, and does not prevent the creditor from serving another bankruptcy notice in respect of the same debt and afterwards presenting a petition on it (*n*).

No assets.

91. It is not a sufficient reason for refusing to make a receiving order that the debtor has no assets presently available for distribution among the creditors, as it is possible that there may be property coming to the debtor between the date of the receiving order and the date of the bankrupt's discharge (*o*).

The court, however, has a discretion, if it is clearly convinced, not merely by the statement of the debtor (*p*) but from all the circumstances of the case, that there are no assets and no prospect of any coming into existence, and that the only effect of a receiving order would be a waste of money in costs, and may refuse to make a receiving order, especially where there is a previous bankruptcy still in existence (*q*), or where the proceedings are of an oppressive character (*r*).

Only one asset.

Where the debtor has only one asset, *e.g.*, an interest determinable on bankruptcy, and the effect of a receiving order would be to destroy this asset, and consequently the only fund available for the payment of the creditors, this is sufficient reason for the court to refuse to make a receiving order (*s*).

But it is no ground for refusing to make a receiving order that the debtor's principal asset will be destroyed by the making of the receiving order. It is not enough to prove that he has but one asset at present, or that it will probably be the sole asset. To justify the court in refusing to make a receiving order there must be evidence, other than that of the debtor, that the only asset is one determinable on bankruptcy, and that there is no likelihood of there being any other (*t*).

Assets likely to be absorbed by costs.

If there are assets, the mere fact that the costs of the bankruptcy proceedings appear likely to absorb the whole of them is not a sufficient ground for refusing to make a receiving order. If there are assets in fact, other than an asset which bankruptcy proceedings must inevitably destroy, then, in the absence of any other reasons to the contrary, the receiving order should be made, as it is possible that in the course of the bankruptcy proceedings it may turn out that the assets available for distribution are larger than appears to be the case on the hearing of the petition (*a*).

(*n*) *Re Vitoria, Ex parte Vitoria*, [1894] 2 Q. B. 387, approved in *King* v. *Henderson*, [1898] A. C. 720. In the same manner, after bankruptcy, the trustee can go behind settled accounts (*Re Van Laun, Ex parte Chatterton*, [1907] 2 K. B. 23).

(*o*) *Re Leonard, Ex parte Leonard*, [1896] 1 Q. B. 473; *Re Murietta, Ex parte South American and Mexican Co.* (1896), 3 Mans. 35.

(*p*) *Re Birkin* (1896), 3 Mans. 291.

(*q*) *Ex parte Robinson, Re Robinson* (1883), 22 Ch. D. 816; *Re Betts, Ex parte Betts*, [1897] 1 Q. B. 50.

(*r*) *Re Somers, Ex parte Union Credit Bank* (1897), 4 Mans. 227.

(*s*) *Re Otway, Ex parte Otway*, [1895] 1 Q. B. 812.

(*t*) *Re Birkin* (1896), 3 Mans. 291.

(*a*) *Re Jubb, Ex parte Burman and Greenwood*, [1897] 1 Q. B. 641.

The mere fact that property to which the debtor is entitled is by reason of an administration action locked up and not available for distribution is no reason for refusing to make a receiving order (*b*). But if there are legal proceedings pending by which, if the debtor is successful, he would obtain funds sufficient to pay his debts, this may be a ground for refusal (*c*).

Assets not available.

92. The mere fact that the debtor has only one creditor is not of itself sufficient cause for refusing to make a receiving order (*d*).

Only one creditor.

If the debtor can procure a substantial guarantee for the payment of his debts in full, this, it seems, would be a sufficient cause for the dismissal of a petition against him (*e*).

Guarantee for payment.

It is not a sufficient reason for refusing to make a receiving order that the debtor is a surety, and that the creditor holds a security from the principal debtor which has not been realised (*f*).

Security not realised.

The court has no jurisdiction to dismiss a petition on the ground that shortly before its presentation the debtor, with the assent of a majority of his creditors, executed a deed, assigning the whole of his property to trustees to be administered as in bankruptcy, however beneficial to the creditors such an arrangement may be; if there are any creditors who dissent from such an arrangement and present a petition, it is against the policy of the Bankruptcy Acts to allow such an arrangement to prevent the administration of the debtor's assets in accordance with bankruptcy law (*g*). The pendency of bankruptcy proceedings in a foreign country is no ground for dismissing an English petition, if there are assets or a prospect of assets in England (*h*). If in such a case there are neither assets nor the prospect of assets in England, the petition should be dismissed (*i*). If a majority of the creditors in number and value are resident in Scotland or Ireland and by reason of the situation of the debtor's property or other causes, his estate ought to be distributed among the creditors under the Scots or Irish bankruptcy laws, the court may dismiss the English petition on such terms as it may think fit (*k*).

Arrangements with creditors.

Foreign bankruptcy proceedings.

93. If the presentation of a petition is an abuse of the process of the court, it should be dismissed (*l*).

Abuse of process.

(*b*) *Re Whitley, Ex parte Mirfield Commercial Co.* (1891), 8 Morr. 149.
(*c*) *Ex parte Dixon, Re Dixon* (1884), 13 Q. B. D. 118, *per* BAGGALLAY, L.J., at p. 123.
(*d*) *Re Hecquard, Ex parte Hecquard* (1889), 24 Q. B. D. 71.
(*e*) *Ex parte Dixon, Re Dixon, supra, per* BAGGALLAY, L.J., at p. 123.
(*f*) *Re G. Hodges, Ex parte Matthews* (1896), 3 Mans. 329.
(*g*) *Ex parte Dixon, Re Dixon, supra; Ex parte Oram, Re Watson* (1885), 15 Q. B. D. 399.
(*h*) *Re Artola Hermanos, Ex parte André Châle* (1890), 24 Q. B. D. 640; *Ex parte McCulloch, Re McCulloch* (1880), 14 Ch. D. 716.
(*i*) *Ex parte Robinson, Re Robinson* (1883), 22 Ch. D. 816.
(*k*) Bankruptcy Act, 1883 (46 & 47 Vict. c. 52), s. 14.
(*l*) *E.g.*, when after dismissal of a petition by a creditor the same creditor joins with another creditor in presenting a second petition founded, so far as the first creditor is concerned, on the same debt and the same act of bankruptcy (*Re Larard, Ex parte Yeomans and Heap* (1896), 3 Mans. 317).

SUB-SECT. 1. Circumstances justifying Receiving Order.

If a petition is made a means of extorting or attempting to extort money, it is the duty of the court to dismiss it (*m*).

If a creditor attempts to extort money as a condition of his assent to a transaction carried out in order to avoid bankruptcy, and afterwards presents a petition founded on the same transaction, the petition is tainted and should be dismissed (*n*).

Creditor extorting money.

Illegitimate purpose.

If a petition is presented by a creditor for an illegitimate purpose, not with the *bonâ fide* view of obtaining an adjudication, but for some collateral purpose or with the view of putting pressure on the debtor, it should be dismissed as an abuse of the process of the court (*o*).

Purchase of debt.

The purchase of a debt in order to found a bankruptcy petition upon it does not necessarily constitute an abuse of the process of the court (*p*).

Creditor's motive.

The mere fact that the petitioning creditor is actuated by a motive other than a desire to obtain a distribution of the debtor's assets in bankruptcy, *e.g.*, by a wish to put an end to a partnership with the debtor, does not constitute an abuse of the process of the court so as to disentitle the petitioning creditor to a receiving order (*q*).

SUB-SECT. 2.—*Effect of Receiving Order.*

Effect on creditors of receiving order.

94. By the making of a receiving order an official receiver is constituted receiver of the property of the debtor, and thereafter, except as directed by the Bankruptcy Acts, no creditor to whom the debtor is indebted in respect of any debt provable in bankruptcy may have any remedy against his property or person in respect of the debt, or may commence any action or other legal proceedings against him unless with the leave of the court, and on such terms as the court may impose; but the power of a secured creditor to realise or otherwise deal with his security is unaffected by the making of the receiving order (*r*).

The receiving order begins to take effect on the day on which it is made, although it may be signed afterwards, or even not drawn up at all (*s*).

(*m*) *Re Atkinson, Ex parte Atkinson* (1892), 9 Morr. 193; *Re Otway, Ex parte Otway*, [1895] 1 Q. B. 812.

(*n*) *Re Shaw, Ex parte Gill* (1901), 83 L. T. 754; *Re a Debtor, Ex parte the Debtor* (1905), 91 L. T. 664. See p. 39, *ante*.

(*o*) *Re Davies, Ex parte King* (1876), 3 Ch. D. 461; *Ex parte Griffin, Re Adams* (1879), 12 Ch. D. 480; *Re Baker, Ex parte Baker* (1887), 5 Morr. 5. See p. 39, *ante*.

(*p*) *Re Baker, supra*. But see *Ex parte Griffin, supra*.

(*q*) *King* v. *Henderson*, [1898] A. C. 720.

(*r*) Bankruptcy Act, 1883 (46 & 47 Vict. c. 52), s. 9 (1) and (2). For forms of a receiving order, see Bankruptcy Rules, rr. 176, 177, Appendix, Forms, Nos. 28, 29, 29 A. As to advertisement and service of receiving order, see Bankruptcy Act, 1883, ss. 13, 70 (1) (f); Bankruptcy Rules, rr. 179, 182. As to stay of the advertisement of the receiving order, see *Ex parte Carr, Re Carr* (1886), 35 W. R. 150. In case of small estates where the assets are not likely to exceed £300 in value, an order may be made for the administration of the debtor's estate in a summary manner, see Bankruptcy Act, 1883, s. 121; Bankruptcy Rules, rr. 272, 273, and pp. 294 *et seq.*, *post*. As to the duties of the official receiver, see pp. 100, 101, *post*.

(*s*) *Re Manning* (1885), 30 Ch. D. 480; *Blount* v. *Whitely* (1898), 6 Mans. 48.

SUB-SECT. 2. Effect of Receiving Order.

95. A receiving order is not equivalent to an adjudication in bankruptcy (*t*); it does not divest the debtor of his property, or make him a bankrupt, or place him under the disabilities of an adjudicated bankrupt; notwithstanding the receiving order, the debtor is the only person who can sue for the recovery of what belongs to him, and if he sues, he cannot be ordered to give security for costs, as if he were a mere nominal plaintiff (*a*).

Effect on debtor.

The making of the receiving order vests no estate or interest in the receiver; it gives him no power of bringing or defending actions; it does not cause any change or transmission of interest or liability so as to render it necessary or desirable that he should be made a party to any action which the debtor is bringing or defending (*b*). What the debtor recovers after the receiving order by an action is his property, both legally and equitably, although he must, when he receives it, hand it over to the official receiver for the benefit of his creditors, if he does not pay or compound with them (*c*). The debtor's estate is not altered by the receiving order; if he was the occupier of premises before the order, and the official receiver takes possession after the order, the debtor remains the occupier, and not the official receiver (*d*).

No estate or interest of debtor in property divested or altered.

If the debtor was before the receiving order entitled to receive the income of any property, the income is not vested in the official receiver by the order, but it becomes payable to him (*e*). It is not proper for the official receiver before adjudication to realise the debtor's estate, or to deal with it, except for the purpose of protecting and preserving it (*f*).

As regards a receiving order made against a firm, the order operates as if it were a receiving order made against each of the persons who at the date of the order is a partner (*g*).

Partners.

After the making of the receiving order, the debtor's property is in the custody of the law, and it is a contempt of court for anyone to interfere with the possession of the official receiver after he has taken possession (*h*).

Interference with official receiver's possession of debtor's property.

The only person who can interfere with the possession of the official receiver is the debtor's landlord to whom rent is owing. The court will not restrain the landlord from exercising

Landlord's rights.

(*t*) The court may, however, on the application of the debtor himself adjudge him bankrupt at the time of making the receiving order, or at any time thereafter; the application may be made orally and without notice (Bankruptcy Rules, r. 190).

(*a*) *Rhodes* v. *Dawson* (1886), 16 Q. B. D. 548.

(*b*) *Re Berry*, [1896] 1 Ch. 939. See R. S. C., Ord. 17, r. 4, and title PRACTICE AND PROCEDURE.

(*c*) *Rhodes* v. *Dawson* (1886), 16 Q. B. D. 548, *per* LINDLEY, L.J., at p. 554.

(*d*) *E.g.*, for obtaining a supply of gas under the Gasworks Clauses Act (34 & 35 Vict. c. 41), s. 11 (*Re Smith, Ex parte Mason*, [1893] 1 Q. B. 323, where the supply of gas had been stopped owing to arrears by the debtor, and it was held that the official receiver could not demand a supply as occupier).

(*e*) *Re Sartoris*, [1892] 1 Ch. 11.

(*f*) *Re Wells and Croft, Ex parte Official Receiver* (1894), 2 Mans. 41.

(*g*) Bankruptcy Rules, r. 262.

(*h*) *Ex parte Cochrane, Re Mead* (1875), L. R. 20 Eq. 282. Compare *Re Fells, Ex parte Andrews* (1876), 4 Ch. D. 509.

SUB-SECT. 2. Effect of Receiving Order.

his right of distress (*i*), which is specially reserved to a limited extent (*k*).

Stay of actions etc.

96. The court has power (*l*) to stay any action, execution or other legal process against the property or person of the debtor: this power may be exercised at any time after the presentation of a bankruptcy petition, *i.e.* before the receiving order as well as after; although the words of the Bankruptcy Act conferring this power are wider than the words which prohibit proceedings against the debtor after the receiving order, the court will, it seems, be guided by the same principles in each case (*m*).

Proceedings which will not be stayed.

Thus proceedings of a punitive character will not be restrained under the power of the court to stay actions (*n*). The prohibition of proceedings after the making of a receiving order does not take away the jurisdiction of a court of competent jurisdiction to order the committal or attachment (*o*) of a defaulting trustee or solicitor, or prevent the debtor from being committed to prison, if he has by his misconduct rendered himself liable to imprisonment (*p*).

Debts etc. not provable in bankruptcy.

Actions or proceedings in respect of a debt or liability which is not provable in bankruptcy are unaffected by the making of a receiving order. The obligation to make payments of alimony is not a debt or liability which is provable in bankruptcy, and therefore orders for the payment of arrears of alimony may be made and enforced in spite of a receiving order, whether the arrears fell due before or after the making of a receiving order (*q*).

The bankruptcy court will not restrain any action against a bankrupt to which his discharge would not be a defence (*r*). It may, however, restrain proceedings under a writ of sequestration issuing from the Chancery Division of the High Court (*s*); and before issuing a sequestration against a bankrupt's real estate situate abroad for the purpose of compelling his appearance in an action abroad, the leave of the bankruptcy court should be obtained (*t*).

(*i*) *Ex parte Till, Re Mayhew* (1873), L. R. 16 Eq. 97; *Ex parte Birmingham and Staffordshire Gas Light Co., Re Fanshaw and Gorston* (1871), L. R. 11 Eq. 615; *Ex parte Harrison, Re Peake* (1884), 13 Q. B. D. 753. See also p. 291, *post*.

(*k*) Bankruptcy Act, 1883 (46 & 47 Vict. c. 52), s. 42; Bankruptcy Act, 1890 (53 & 54 Vict. c. 71), s. 28; see p. 291, *post*.

(*l*) Under the Bankruptcy Act, 1883 (46 & 47 Vict. c. 52), s. 10 (2).

(*m*) See *ibid.*, s. 9 (1), p. 60, *ante*. An order staying any action or proceeding against the debtor, or staying proceedings generally, may be included in the receiving order (Bankruptcy Rules, r. 181).

(*n*) Imprisonment for non-payment of rates under the Distress for Rates Act, 1849 (12 & 13 Vict. c. 14), s. 2, is a punitive process, and the Court has no power to discharge a person so imprisoned (*Re Edgcome, Ex parte Edgcome*, [1902] 2 K. B. 403).

(*o*) Under the Debtors Act, 1869 (32 & 33 Vict. c. 62), s. 4.

(*p*) *Re Mackintosh, Ex parte Mackintosh* (1884), 13 Q. B. D. 235; *Re Wray (A Solicitor)* (1887), 36 Ch. D. 138; *Re Smith*, [1893] 2 Ch. 1.

(*q*) *Linton* v. *Linton* (1885), 15 Q. B. D. 239; *Re Hawkins, Ex parte Hawkins*, [1894] 1 Q. B. 25; *Kerr* v. *Kerr*, [1897] 2 Q. B. 439.

(*r*) *Ex parte Coker, Re Blake* (1875), 10 Ch. App. 652; and see *Cobham* v. *Dalton* (1875), 10 Ch. App. 655.

(*s*) *Re Hastings, Ex parte Brown* (1892), 9 Morr. 234.

(*t*) *Ex parte Rogers, Re Boustead* (1881), 16 Ch. D. 665.

SUB-SECT. 2. **Effect of Receiving Order.**

Proceedings which will be stayed.

An action in respect of a debt or liability provable in bankruptcy commenced against the debtor before the receiving order may be stayed at any time after a petition has been presented against him (*a*). Similar actions which are commenced after the receiving order, without the leave of the court, may be stayed (*b*). After the receiving order an order for the payment of a judgment debt by instalments (*c*) cannot be made against a debtor, if the debt is provable in bankruptcy (*d*). So a committal order against a judgment debtor for default in payment of such instalments cannot be made after a receiving order, and, if made before, cannot be enforced afterwards (*e*).

Proceedings abroad.

As regards proceedings against the debtor abroad, an application to restrain an action in Australia against a firm for wrongful dismissal has been refused (*f*). So the court has refused to restrain foreign creditors from suing abroad (*g*), but it has restrained English creditors from so doing (*h*).

County court.

It is doubtful whether a county court sitting in bankruptcy has any power to restrain proceedings in an action in the High Court (*i*). It clearly has not such power in a case in which the High Court, with knowledge of the bankruptcy proceedings, has allowed the proceedings in an action to continue (*j*).

Crown proceedings.

Proceedings at the suit of the Crown against the debtor may, it seems, be restrained after the receiving order both under the prohibition of proceedings and the power of the court to stay actions (*k*).

Service of order.

When the court makes an order staying any action or proceedings, or staying proceedings generally, the order may be served by sending a copy under the seal of the court by prepaid registered post letter to the address for service of the plaintiff or other party prosecuting such proceedings (*l*).

Transfer of pending actions.

If a receiving order is made in the High Court, and any action brought by or continued against the debtor is pending in any other

(*a*) By order of the bankruptcy court, or the court where the action is pending, under the Bankruptcy Act, 1883 (46 & 47 Vict. c. 52), ss. 10, 168; and see *Ex parte Ditton, Re Woods* (1876), 1 Ch. D. 557.

(*b*) *Brownscombe* v. *Fair* (1887), 58 L. T. 85; *Blount* v. *Whitely* (1898), 6 Mans. 48. They are stayed under the Bankruptcy Act, 1883 (46 & 47 Vict. c. 52), s. 9. See p. 60, *ante*.

(*c*) Under the Debtors Act, 1869 (32 & 33 Vict. c. 62), s. 5.

(*d*) *Re Nuthall* (1891), 8 Morr. 106. See Bankruptcy Rules, r. 361; County Court Rules, 1903, Ord. 25, r. 42.

(*e*) *Re Ryley, Ex parte the Official Receiver* (1885), 15 Q. B. D. 329.

(*f*) *Re Spalding and Hodge, Ex parte Chief Official Receiver* (1889), 6 Morr. 163.

(*g*) *Re Chapman* (1872), L. R. 15 Eq. 75.

(*h*) *Ex parte Ormiston, Re Distin* (1871), 24 L. T. 197; *Ex parte Tait, Re Tait & Co.* (1872), L. R. 13 Eq. 311.

(*i*) *Ex parte Reynolds, Re Barnett* (1885), 15 Q. B. D. 169; *Re Richardson and Cook, Ex parte Executors of J. Grime* (1902), 86 L. T. 690. Such an order was made in *Re Hastings, Ex parte Brown* (1892), 9 Morr. 234; but the question of the power of the county court to make the order was not raised.

(*j*) *Re Richardson and Cook, Ex parte Executors of J. Grime, supra.*

(*k*) Bankruptcy Act, 1883 (46 & 47 Vict. c. 52), s. 150. As to the stay of proceedings, see *ibid.*, ss. 9 and 10.

(*l*) *Ibid.*, s. 11; Bankruptcy Rules, r. 92.

SUB-SECT. 2. Effect of Receiving Order.

division of the High Court, the judge who made the receiving order may direct the transfer of such action to himself (*m*).

Secured creditor.

97. The right of a secured creditor to realise or otherwise deal with his security is unaffected by the presentation of a bankruptcy petition or the making of a receiving order (*n*). Thus the court has no jurisdiction to restrain a mortgagee of the bankrupt's property from selling the property (*o*); nor will it restrain a mortgagee from proceeding with an action to enforce his security (*p*).

Holder of bill of sale.

If at the time of the filing of the petition a grantee of a bill of sale is in possession of the mortgaged property, the court will not interfere by injunction with the exercise of his legal rights, unless evidence is given on oath by the applicant as to his belief of some facts which, if established, would render the deed invalid as against those claiming under the bankruptcy (*q*). If such facts are established, an injunction would probably be granted restraining the holder of the bill of sale or other mortgagee.

Growing crops and possession of mortgaged land.

A mortgagee of land who gains lawful possession even after bankruptcy, is entitled as against those claiming under the bankruptcy to the crop growing on the land, and as against the official receiver to the possession of the land (*r*).

Assignment of after-acquired property.

If the mortgage is an assignment of after-acquired property and the mortgagor acquires the property before bankruptcy, then the mortgagee's title is good as against the official receiver (*s*). But if the property does not fall into the possession of the bankrupt until after the bankruptcy, then the mortgagee has no right to the property. Thus if a debt to fall due at a future time is assigned and the debt only falls due after bankruptcy, the assignee has no right to it (*a*); on the other hand, debts due at the date of the assignment, but payable at a future time, may be validly assigned, and if they become payable after bankruptcy, they will none the less belong to the assignee, and not to the trustee in the bankruptcy (*b*).

(*m*) Bankruptcy Act, 1883 (46 & 47 Vict. c. 52), s. 102 (4). It would seem that where a registrar makes a receiving order he does so under delegation from the judge. As to the considerations guiding the court in ordering a transfer, see *Re Champagné, Ex parte Kemp* (1893), 10 Morr. 285.

(*n*) Bankruptcy Act, 1883 (46 & 47 Vict. c. 52), s. 9 (2). As to the meaning of "secured creditor," see *ibid.*, s. 168 (1); p. 45, *ante*.

(*o*) *Re Evelyn, Ex parte General Public Works and Assets Co.*, [1894] 2 Q. B. 302.

(*p*) *Ex parte Hirst, Re Wherly* (1879), 11 Ch. D. 278; *Sharp* v. *McHenry* (1887), 55 L. T. 747. See *Moor* v. *Anglo-Italian Bank* (1879), 10 Ch. D. 681; *White* v. *Simmons* (1871), 6 Ch. App. 555.

(*q*) *Ex parte Buyly, Re Hart* (1880), 15 Ch. D. 223.

(*r*) *Bagnall* v. *Villar* (1879), 12 Ch. D. 812; *Re Gordon, Ex parte Official Receiver* (1889), 6 Morr. 150.

(*s*) *Tailby* v. *Official Receiver* (1888), 13 App. Cas. 523.

(*a*) *Ex parte Hall, Re Whitting* (1878), 10 Ch. D. 615; *Collyer* v. *Isaacs* (1881), 19 Ch. D. 342; *Ex parte Nichols, Re Jones* (1883), 22 Ch. D. 782; *Wilmot* v. *Alton*, [1896] 2 Q. B. 254.

(*b*) *Ex parte Moss, Re Toward* (1884), 14 Q. B. D. 310; *Re Davis & Co., Ex parte Rawlings* (1888), 22 Q. B. D. 193.

SUB-SECT. 2. Effect of Receiving Order.

A mere licence to seize chattels as a security for a debt is determinable on bankruptcy, since the effect of bankruptcy is to bar the right to enforce the debt in such a case (*c*), although a seizure under such a licence is a protected transaction as against the trustee if carried out before notice of an act of bankruptcy (*d*).

Licence to seize.

98. A creditor who has issued execution against the goods or lands of a debtor, or has attached any debt due to him, is not entitled to retain the benefit of the execution or attachment against the trustee in bankruptcy of the debtor unless he has completed the execution or attachment before the date of the receiving order, and before notice of the presentation of any bankruptcy petition by or against the debtor or of the commission of any available act of bankruptcy by him. For the purposes of this provision, execution against goods is completed by seizure and sale, attachment of debt by receipt of the debt, and execution against land by seizure, or in the case of an equitable interest, by the appointment of a receiver (*e*).

Execution.

99. *Bonâ fide* transactions, in order to be protected in the event of bankruptcy, must have taken place before the date of the receiving order (*f*).

Date of protected transactions.

SUB-SECT. 3.—*Meetings of Creditors.*

100. The making of a receiving order is necessarily followed by an adjudication in bankruptcy, unless the debtor makes a proposal for a composition in satisfaction of his debts or for a scheme of arrangement of his affairs, and such proposal is duly accepted by the creditors and approved by the court. For the purposes of considering whether a proposal for a composition or scheme of arrangement should be entertained or whether it is expedient that the debtor should be adjudged bankrupt and generally as to the mode of dealing with his property, a general meeting of the creditors is held as

First meeting of creditors.

(*c*) *Thompson* v. *Cohen* (1872), L. R. 7 Q. B. 527; *Cole* v. *Kernot* (1872), L. R. 7 Q. B. 534, note. Both these cases were decided under the Bankruptcy Act, 1869, but the principle seems applicable to cases under the present Acts.

(*d*) *Krehl* v. *Great Central Gas Consumers' Co.* (1870), L. R. 5 Exch. 289. This decision is not applicable to acts done after the receiving order, see Bankruptcy Act, 1883 (46 & 47 Vict. c. 52), s. 49. But where there is an agreement between a landowner and a builder which provides that the landowner may, upon default of the builder in fulfilling his part of the agreement, re-enter upon the land and expel the builder, but that on such re-entry all the materials then in and about the premises should be forfeited and become the property of the landowner as and for liquidated damages, the right of the landowner to seize, if valid, is not defeated by an act of bankruptcy before the seizure; and those claiming under the bankruptcy in such a case take subject to the right of the landowner under the agreement (*Ex parte Newitt, Re Garrud* (1881), 16 Ch. D. 522). See *Re Waugh, Ex parte Dickin* (1876), 4 Ch. D. 524, and compare *Re Weibking, Ex parte Ward*, [1902] 1 K. B. 713. For the direct effect of bankruptcy upon building contracts, see title BUILDING CONTRACTS ETC.

(*e*) Bankruptcy Act, 1883 (46 & 47 Vict. c. 52), s. 45. See p. 272, *post*.

(*f*) See p. 288, *post*.

SUB-SECT. 3. Meetings of Creditors.

soon as may be after the making of a receiving order (*g*). The first meeting is summoned by the official receiver for a day which he fixes, not later than fourteen days after the date of the receiving order, unless the court for any special reason deems it expedient that it should be summoned for a later day (*h*). It is summoned by giving not less than seven days' notice of its time and place in the *London Gazette* and in a local paper (*i*).

Notice of meeting.

The official receiver, as soon as practicable, sends to each creditor mentioned in the debtor's statement of affairs (*k*) a notice of the time and place of the first meeting of creditors, accompanied by a summary of the debtor's statement of affairs, including the causes of his failure, and any observations thereon which the official receiver may think fit to make, but the proceedings at the first meeting are not invalidated by reason of any such notice or summary not having been sent or received before the meeting (*l*).

Notice to debtor.

The official receiver gives three days' notice to the debtor of the time and place appointed for the first meeting of creditors (*m*); which notice may be either delivered to him personally or sent to him by prepaid post letter; and it is the debtor's duty to attend the first meeting, although the notice is not sent or does not reach him (*n*).

Place of meeting.

The meeting is held at such place as is in the opinion of the official receiver most convenient for the majority of the creditors (*o*).

Chairman.

The official receiver or some person nominated by him is the chairman at the first meeting (*p*). The chairman at subsequent meetings is such person as the meeting may by resolution appoint (*q*).

Subsequent meetings.

101. The official receiver or the trustee, when he is appointed, may at any time summon a meeting of creditors, and must do so whenever so directed by the court, or so requested in writing by any creditor with the concurrence of one-sixth in value of the creditors, including the creditor making the request; but such creditor must deposit with the trustee or official receiver a sum sufficient to pay the costs of summoning the meeting, such sum to be repaid to him out of the estate, if the creditors or the court so

(*g*) Bankruptcy Act, 1883 (46 & 47 Vict. c. 52), s. 15; and see Bankruptcy Rules, r. 192. As to the rules governing meetings of creditors, see Bankruptcy Act, 1883, Sched. I.; Bankruptcy Rules, rr. 249—257.

(*h*) Bankruptcy Act, 1883 (46 & 47 Vict. c. 52), s. 70 (1) (c), Sched. I., r. 1.

(*i*) *Ibid.*, s. 70 (1) (f); Sched. I., r. 2. As to the form of the gazette notice, see Bankruptcy Rules, Appendix, Forms, No. 174 (2).

(*k*) See p. 70, *post*.

(*l*) Bankruptcy Act, 1883 (46 & 47 Vict. c. 52), Sched. I., r. 3. For the form of notice, see Bankruptcy Rules, Appendix, Forms, No. 78. As to meetings subsequent to the first meeting, see Bankruptcy Act, 1883 (46 & 47 Vict. c. 52), Sched. I., rr. 5, 6; Bankruptcy Rules, rr. 15, 251, 252; Bankruptcy Act, 1890 (53 & 54 Vict. c. 71), s. 18.

(*m*) For the form of notice, see Bankruptcy Rules, Appendix, Forms, No. 85. A notice to attend subsequent meetings is to be in the like form (*ibid.*, r. 249).

(*n*) *Ibid.*, r. 249; Bankruptcy Act, 1883 (46 & 47 Vict. c. 52), s. 24 (1).

(*o*) Bankruptcy Act, 1883 (46 & 47 Vict. c. 52), s. 70 (1) (c); Sched. I., r. 4.

(*p*) For the form of nomination, see Bankruptcy Rules, Appendix, Forms, No. 86.

(*q*) Bankruptcy Act, 1883 (46 & 47 Vict. c. 52), s. 70 (1) (c); Sched. I., r. 7.

direct (*r*). Meetings subsequent to the first meeting are summoned by sending notice of the time and place thereof to each creditor at the address given in his proof, or, if he has not proved, at the address given in the debtor's statement of affairs, or at such other address as may be known to the person summoning the meeting (*s*).

SUB-SECT. 3. Meetings of Creditors.

102. A person may not vote as a creditor at the first or any other meeting of creditors, unless he has duly proved a debt provable (*t*) in bankruptcy to be due to him from the debtor, and the proof has been duly lodged before the time appointed for the meeting (*a*). A proof intended to be used at the first meeting of creditors must be lodged with the official receiver not later than the time mentioned for that purpose in the notice convening the meeting, which time must not be earlier than twelve o'clock noon of the day but one before and not later than twelve o'clock noon of the day before the day appointed for the meeting (*b*); a proof intended to be used at an adjournment of the first meeting, if not lodged in time for the first meeting, must be lodged not less than twenty-four hours before the time fixed for holding the adjourned meeting (*c*). A creditor may not vote at any meeting in respect of any unliquidated or contingent debt or any debt the value of which is not ascertained (*d*).

Voting at meetings.

Proof of debts.

A secured creditor who wishes to vote must, unless he surrenders his security, state in his proof the particulars of his security, the date when it was given, and the value at which he assesses it. He may then vote only in respect of the balance due to him after deducting the value of his security. If he votes in respect of his whole debt, he is deemed to have surrendered his security, unless the

Secured creditor.

(*r*) Bankruptcy Act, 1890 (53 & 54 Vict. c. 71), s. 18, amending Bankruptcy Act, 1883 (46 & 47 Vict. c. 52), s. 89 (2), Sched. I., r. 5. As to the calculation of the cost of such meetings, see Bankruptcy Rules, r. 254.

(*s*) Bankruptcy Act, 1883 (46 & 47 Vict. c. 52), Sched. I., r. 6; Bankruptcy Rules, r. 251, Appendix, Forms, No. 101. The proceedings at such meetings are not invalidated by the fact that some of the creditors have not received the notice sent to them (*ibid.*, r. 252).

(*t*) As to what debts are provable in bankruptcy, see p. 197, *post*. As to the time for proving, the Bankruptcy Act, 1883 (46 & 47 Vict. c. 52), Sched. II., r. 1, provides that every creditor shall prove his debt as soon as may be after the making of the receiving order, but this rule is only directory, and does not deprive the creditor of the right to prove at any time (*Re McMurdo*, [1902] 2 Ch. 684, *per* VAUGHAN WILLIAMS, L.J., at p. 700).

(*a*) Bankruptcy Act, 1883 (46 & 47 Vict. c. 52), Sched. I., r. 8. The proof has to be by affidavit, and if for a debt above £2 must bear a shilling stamp. As to the form of proof, see Bankruptcy Rules, r. 219, Appendix, Forms, No. 72. An affidavit or proof of debt may be sworn before an assistant official receiver or any clerk of an official receiver duly authorised in writing by the Court or the Board of Trade (*ibid.*, r. 219 A).

(*b*) Bankruptcy Rules, r. 222. A debt may be proved by sending the affidavit to the official receiver, or, if a trustee has been appointed, to the trustee, through the post in a prepaid letter (Bankruptcy Act, 1883 (46 & 47 Vict. c. 52), Sched. II., r. 2).

(*c*) Bankruptcy Rules, r. 222 a.

(*d*) Bankruptcy Act, 1883 (46 & 47 Vict. c. 52), Sched. I., r. 9; *Ex parte Ruffle, Re Dummelow* (1873), 8 Ch. App. 997; *Re Parrott, Ex parte Whittaker* (1891), 8 Morr. 49; and see p. 197, *post*.

SUB-SECT. 3. Meetings of Creditors.

court on application is satisfied that the omission to value the security arose from inadvertence (*e*).

Holder of bill of exchange.

A creditor may not vote in respect of any debt on or secured by a current bill of exchange or promissory note held by him, unless he is willing to treat the liability to him thereon of every solvent person who is liable thereon antecedently to the debtor as a security in his hands, and to estimate the value thereof, and for the purposes of voting to deduct it from his proof (*f*).

Partnership creditor.

If a receiving order is made against one partner of a firm, any creditor to whom that partner is indebted jointly with the other partners of the firm, or any of them, may prove his debt for the purposes of voting, and may vote, at any meeting of creditors (*g*).

Where a receiving order is made against a firm, the joint and separate creditors must be collectively convened to the first meeting of creditors (*h*).

Admission of proofs.

The chairman of a meeting has the power to admit or reject a proof for the purpose of voting, but his decision is subject to appeal to the court. If he is in doubt whether the proof of a creditor should be admitted or rejected, he should mark the proof as objected to and allow the creditor to vote, subject to the vote being declared invalid in the event of the objection being sustained (*i*).

Proxies.

103. A creditor may vote either in person or by proxy. Proxies may be either general or special, and must be lodged with the official receiver or trustee not later than four o'clock on the day before the meeting or adjourned meeting at which they are to be used (*k*). A minor may not be appointed either as general or special proxy (*l*), but the official receiver may be appointed and act in either capacity (*m*), and, if he cannot attend a meeting at which such proxies might be used, may depute some person in his employment or some officer of the Board of Trade by writing under his hand to attend such meeting and use such proxies on his behalf and in such manner as he may direct (*n*).

Execution of proxy by creditor's agent.

A proxy given by a creditor is deemed to be sufficiently executed, if it is signed by any person in the employ of the creditor having a general authority to sign for such creditor, or by the authorised agent of such creditor if resident abroad. Such authority must be in writing and be produced to the official receiver, if required (*o*).

(*e*) Bankruptcy Act, 1883 (46 & 47 Vict. c. 52), Sched. I., r. 10; *ibid.*, Sched. II., rr. 9—15; *Ex parte Clarke, Re Burr* (1892), 67 L. T. 232; *Re Safety Explosives, Ltd.*, [1904] 1 Ch. 226; *Re Henry Lister & Co., Ex parte Huddersfield Banking Co.*, [1892] 2 Ch. 417; *Re Piers, Ex parte Piers*, [1898] 1 Q. B. 627; *Re McMurdo*, [1902] 2 Ch. 684; *Re Rowe, Ex parte West Coast Gold Fields*, [1904] 2 K. B. 489; and see p. 228, *post*.

(*f*) Bankruptcy Act, 1883 (46 & 47 Vict. c. 52), Sched. I., r. 11.

(*g*) *Ibid.*, r. 13.

(*h*) Bankruptcy Rules, r. 265.

(*i*) Bankruptcy Act, 1883 (46 & 47 Vict. c. 52), Sched. I., r. 14. See *Re Bottomley* (1892), 8 T. L. R. 424; *Re Clark*, [1901] 1 K. B. 655.

(*k*) Bankruptcy Act, 1883 (46 & 47 Vict. c. 52), Sched. I., r. 19; Bankruptcy Rules, r. 245.

(*l*) Bankruptcy Rules, r. 248.

(*m*) Bankruptcy Act, 1883 (46 & 47 Vict. c. 52), Sched. I., r. 21.

(*n*) Bankruptcy Rules, r. 327, Appendix, Forms, No. 86.

(*o*) *Ibid.*, r. 246.

Every instrument of proxy must be in the prescribed form, and be issued by the official receiver of the debtor's estate, or by some other official receiver, or, after the appointment of a trustee, by the trustee, and every insertion therein must be in the writing of the person giving the proxy, or of any manager or clerk or other person in his regular employment, or of any commissioner to administer oaths in the Supreme Court (*p*). General and special forms of proxy must be sent to the creditors together with the notice summoning a meeting of creditors, and neither the name nor the description of the official receiver, or of any other person, may be printed or inserted in the body of any instrument of proxy before it is so sent (*q*).

Form of proxy.

Issue of forms of proxy.

A creditor may give a general proxy to his manager or clerk, or any other person in his regular employment. In such case the instrument of proxy must state the relation in which the person appointed stands to the creditor (*r*).

General proxy.

A creditor may give a special proxy to vote at any specified meeting or adjournment thereof for or against any specific proposal for a composition or scheme of arrangement, for or against the appointment of any specified person as trustee at a specified rate of remuneration, or as member of the committee of inspection, or for or against the continuance in office of any specified person as trustee or member of a committee of inspection, or on all questions relating to any other matter arising at any specified meeting or adjournment thereof (*s*).

Special proxy.

No person acting under a general or special proxy may vote in favour of any resolution which would directly or indirectly place himself, his partner or employer, in a position to receive any remuneration out of the debtor's estate otherwise than as a creditor rateably with the other creditors of the debtor; but a person holding special proxies to vote for the appointment of himself as trustee may use such proxies and vote accordingly (*t*).

Unfair use of proxy.

If it appears to the satisfaction of the Court that any solicitation has been used by or on behalf of a trustee or receiver in obtaining proxies, or in procuring the trusteeship or receivership, the Court may order that no remuneration shall be allowed to such person, notwithstanding any resolution of the committee of inspection or of the creditors to the contrary (*a*).

Penalty on solicitation.

104. The chairman of a meeting may, with the consent of the meeting, adjourn the meeting from time to time and from place to

Adjournment of meeting.

(*p*) Bankruptcy Act, 1890 (53 & 54 Vict. c. 71), s. 22 (1). For the form of general proxy, see Bankruptcy Rules, Appendix, Forms, No. 75; of special proxy, *ibid.*, No. 76. A proxy must be attested by some person other than the one appointed as proxy (*Re Parrott, Ex parte Cullen*, [1891] 2 Q. B. 151). As to filling up the proxy where the creditor is blind or incapable of writing, see Bankruptcy Rules, r. 247. As to the cancellation of a stamp on a proxy, see *McMullen* v. "*Sir Alfred Hickman*" *Steamship, Ltd.* (1902), 71 L. J. (CH.) 766.

(*q*) Bankruptcy Act, 1883 (46 & 47 Vict. c. 52), s. 70 (1) (d); Bankruptcy Act, 1890 (53 & 54 Vict. c. 71), s. 22 (2).

(*r*) Bankruptcy Act, 1883 (46 & 47 Vict. c. 52), Sched. I., r. 17.

(*s*) Bankruptcy Act, 1890 (53 & 54 Vict. c. 71), s. 22 (3).

(*t*) Bankruptcy Act, 1883 (46 & 47 Vict. c. 52), Sched. I., r. 26.

(*a*) *Ibid.*, r. 20.

SUB-SECT. 3. Meetings of Creditors.

place (*b*). If in the resolution for adjournment no other place is specified, the adjourned meeting is held at the same place as the original meeting (*c*).

Quorum.

105. A meeting is not competent to act for any purpose except the election of a chairman, the proving of debts, and the adjournment of the meeting, unless there are present or represented at least three creditors who are entitled to vote, or all the creditors, if their number does not exceed three (*d*).

If within half an hour from the time appointed for the meeting a quorum of creditors is not present or represented, the meeting must be adjourned to the same day in the following week at the same time and place, or to such other day as the chairman may appoint not less than seven or more than twenty-one days after (*e*). If a quorum of creditors does not attend at the first meeting or one adjournment thereof, the court may, on the application of a creditor or of the official receiver, forthwith adjudge the debtor bankrupt (*f*).

Minutes.

106. The chairman of every meeting must cause minutes of the proceedings at the meeting to be drawn up and fairly entered in a book kept for that purpose, and the minutes must be signed by him or by the chairman of the next ensuing meeting (*g*).

Minutes so signed by a person describing himself as, or appearing to be, chairman of the meeting at which the minutes are signed are received in evidence without further proof. Until the contrary is proved, every meeting in respect of the proceedings of which minutes have been so signed is deemed to have been duly convened and held, and all resolutions passed or proceedings had thereat to have been duly passed or had (*h*).

SUB-SECT. 4.—*Statement of Affairs and Public Examination.*

Preparation of statement of affairs.

107. The debtor within three days from the date of the receiving order if made on his own petition, and within seven days of the order if made on a creditor's petition, must make out and submit to the official receiver a statement of his affairs in the prescribed form (*i*), showing the particulars of his assets, debts, and liabilities, the names, residences, and occupations of his creditors, the securities held by them, the dates when the securities were given, and such further information as may be prescribed or as the official receiver

(*b*) Bankruptcy Act, 1883 (46 & 47 Vict. c. 52), Sched. I., r. 22.
(*c*) Bankruptcy Rules, r. 256.
(*d*) Bankruptcy Act, 1883 (46 & 47 Vict. c. 52), Sched. I., r. 23; Bankruptcy Rules, r. 257.
(*e*) Bankruptcy Act, 1883 (46 & 47 Vict. c. 52), Sched. I., r. 24.
(*f*) *Ibid.*, s. 20 (1); Bankruptcy Rules, r. 191.
(*g*) Bankruptcy Act, 1883 (46 & 47 Vict. c. 52), Sched. I., r. 25. As to form of minutes, see Bankruptcy Rules, Appendix, Forms, Nos. 87—89.
(*h*) Bankruptcy Act, 1883 (46 & 47 Vict. c. 52), s. 133.
(*i*) See Bankruptcy Rules, Appendix, Forms, No. 46. The official receiver must furnish the debtor with instructions for the preparation of his statement (*ibid.*, rr. 217, 324, Appendix, Forms, No. 46).

may require (*k*). The statement is made out in duplicate, and one copy is verified by affidavit (*l*).

SUB-SECT. 4. Statement of Affairs.

If the receiving order has been made against a firm, the debtors submit a statement of their partnership affairs, and each debtor submits a statement of his separate affairs (*m*).

Statement by firm.

Admissions made by a debtor in his statement of affairs can be used as evidence in criminal proceedings against him (*n*).

Statement evidence in criminal proceedings.

Where the debtor cannot himself prepare a proper statement of affairs, the official receiver may at the expense of the estate employ some person or persons to assist in its preparation (*o*).

Assistance in preparation of statement.

If the debtor fails to comply with the requirements as to drawing up of a statement of affairs, the court may on the application of the official receiver or of any creditor adjudge him bankrupt (*p*), and he may become liable to be committed to prison for contempt of court (*q*).

Failure to prepare statement of affairs.

The official receiver must file in court the verified statement of affairs (*r*), and any person stating himself in writing to be a creditor of the bankrupt may, personally or by agent, inspect the statement at all reasonable times and take a copy or make an extract (*s*).

Filing and inspection.

108. Where a receiving order has been made against a debtor, it is the official receiver's duty to make an application to the court to appoint a day and hour for the public examination of the debtor; and upon such application being made the court appoints the day and hour for the examination and orders the debtor to attend the court upon such day and at such hour (*t*). The court thereupon holds a public sitting on the day appointed for the examination of the debtor; and the duty of the debtor is to attend and to be examined as to his conduct, dealings, and property (*u*). The examination

Holding of public examination.

(*k*) Bankruptcy Act, 1883 (46 & 47 Vict. c. 52), s. 16 (1), (2). The Court or the official receiver may for special reasons extend the time for delivering the statement (*ibid.*, s. 16 (2), and Bankruptcy Rules, r. 218).

(*l*) *Ibid.*, r. 217.

(*m*) *Ibid.*, r. 263.

(*n*) *R.* v. *Pike*, [1902] 1 K. B. 552. An admission of a debt in the statement of affairs will not avail to prevent the operation of the Statute of Limitations, 1623 (21 Jac. 1, c. 16, s. 3), in respect of a simple contract debt (*Courtenay* v. *Williams* (1844), 3 Hare, 539, at p. 550; *Everett* v. *Robertson* (1858), 1 E. & E. 16; *McDonnell* v. *Broderick*, [1896] 2 Ir. 136, at p. 167). Such an admission is, it seems, a sufficient acknowledgment for the purposes of s. 8 of the Real Property Limitation Act, 1874 (37 & 38 Vict. c. 57), and s. 14 of the Real Property Limitation Act, 1833 (3 & 4 Will. 4, c. 27) (*Barrett* v. *Birmingham* (1842), 4 Ir. Eq. Rep. 537). See further, title LIMITATION OF ACTIONS.

(*o*) Bankruptcy Act, 1883 (46 & 47 Vict. c. 52), s. 70 (2). If he employs anyone for this purpose, he must forthwith report it to the Board of Trade (Bankruptcy Rules, r. 326).

(*p*) Bankruptcy Act, 1883 (46 & 47 Vict. c. 52), s. 16 (3).

(*q*) *Ibid.*, s. 24 (4).

(*r*) Bankruptcy Rules, r. 217.

(*s*) Bankruptcy Act, 1883 (46 & 47 Vict. c. 52), s. 16 (4).

(*t*) Bankruptcy Rules, r. 184. As to form of application and order, see *ibid.*, Appendix, Forms, Nos. 33, 34; as to service and notice of order, *ibid.*, rr. 186, 195. As to advertisement of the examination, see Bankruptcy Act, 1883 (46 & 47 Vict. c. 52), s. 70 (1) (f); Bankruptcy Rules, r. 186, Appendix, Forms, No. 174 (2).

(*u*) Bankruptcy Act, 1883 (46 & 47 Vict. c. 52), s. 17 (1).

SUB-SECT. 4. Public Examination.

is held as soon as conveniently may be after the expiration of the time for the submission of the debtor's statement of affairs (*a*). A registrar of a court having jurisdiction in bankruptcy has power to hold, and in practice holds, the public examination of debtors (*b*). The court may adjourn the examination from time to time (*c*).

Debtor's failure to attend.

If the debtor fails to attend the public examination at the time and place appointed by any order for holding or proceeding with it, and no good cause is shown by him for such failure, the court, on proof of service of the order requiring his attendance, may issue a warrant for his arrest, or make such other order as the court shall think just (*d*). If the debtor fails without good cause to attend the public examination or any adjournment thereof or fails to disclose his affairs, the examination may be adjourned *sine die*, and the debtor forthwith adjudicated bankrupt (*e*).

Debtor unfit to attend.

If the debtor is a lunatic or suffers from such mental or physical affliction or disability as in the opinion of the court makes him unfit to attend his public examination, the court may dispense with the examination, or direct that he be examined on such terms, in such manner, and at such place as to the court seems expedient (*f*).

Joint debtors.

For the purpose of approving a composition or scheme by joint debtors, the court may, on the report of the official receiver that it is expedient so to do, dispense with the public examination of one of the joint debtors, if he is unavoidably prevented from attending the examination by illness or absence abroad (*g*).

Who may take part in examination.

109. Any creditor who has tendered a proof, or his representative authorised in writing, may question the debtor at his public examination concerning his affairs, and the causes of his failure (*h*).

Official receiver.

The official receiver takes part in the examination as the Board of Trade directs, and if specially authorised by the Board of Trade may employ a solicitor with or without counsel (*i*). In practice the official receiver commences the examination and, except in large or complicated cases, usually conducts the greater part of it.

(*a*) Bankruptcy Act, 1883 (46 & 47 Vict. c. 52), s. 17 (2). See p. 70, *ante*.

(*b*) *Ibid.*, s. 99 (2) (b); Bankruptcy Rules, r. 7. The public examination of debtors is one of the matters which are assigned to the registrars in bankruptcy in the High Court by the order of CAVE, J., of January 1, 1884 (Bankruptcy Acts, 1883—1890, by Chalmers and Hough, 6th ed., by Mackenzie and Clarke, p. 777).

(*c*) Bankruptcy Act, 1883 (46 & 47 Vict. c. 52), s. 17 (3).

(*d*) Bankruptcy Rules, r. 185. See also Bankruptcy Act, 1883 (46 & 47 Vict. c. 52), s. 25 (1) (a), (d).

(*e*) Bankruptcy Rules, rr. 187—189, 192 A.

(*f*) Bankruptcy Act, 1890 (53 & 54 Vict. c. 71), s. 2 (2). As to the making of applications in such a case, see Bankruptcy Rules, r. 189 A, and for forms of order, *ibid.*, Appendix, Forms, Nos. 41 a and 41 b.

(*g*) Bankruptcy Act, 1883 (46 & 47 Vict. c. 52), s. 105 (6).

(*h*) *Ibid.*, s. 17 (4). A solicitor who appears for the debtor may be called upon to produce his authority in writing (*R.* v. *Registrar of Greenwich County Court* (1885), 15 Q. B. D. 54). The practice is to allow the debtor to be represented by solicitor or counsel. See *Re Greys Brewery Co.* (1883), 25 Ch. D. 400, at p. 405.

(*i*) Bankruptcy Act, 1883 (46 & 47 Vict. c. 52), ss. 17 (5), 69 (3). See Bankruptcy Rules, r. 323 C.

SUB-SECT. 4. Public Examination.

If a trustee is appointed before the conclusion of the examination, he may take part in it (*j*).

The court may put such questions to the debtor as it may think expedient (*k*).

Trustee.

Court.

110. The debtor is examined on oath, and his duty is to answer all such questions as the court may put or allow to be put to him. Such notes of the examination as the court thinks proper are taken down in writing and read over to or by the debtor and signed by him, and may afterwards be used as evidence against him, and must also be open to the inspection of any creditor at all reasonable times (*l*).

Scope of examination.

Admissibility of debtor's answers in other proceedings.

A debtor cannot on his examination refuse to answer questions on the ground that his answers may tend to incriminate him, and his answers are admissible as evidence against him in criminal and other proceedings (*m*). But there are certain offences relating to the misappropriation of property by trustees and others (*n*) as regards proceedings in respect of which a statement or admission by any person at any compulsory examination in bankruptcy is not admissible as evidence against him (*o*).

Proof of answers where debtor does not sign.

If the debtor does not sign the notes of his examination, the person who took the notes may be called to prove the answers made by him (*p*).

Postponement where criminal proceedings pending.

The fact that a criminal prosecution is pending against him, and that the statements made by him on his examination may be used against him on the criminal trial, may be some ground for postponing the further examination of the debtor till after the trial is concluded (*q*).

Statements not admissible except as against debtor.

The statements made by a debtor at his public examination are not admissible in evidence in proceedings even in the same bankruptcy as against other parties (*r*).

(*j*) Bankruptcy Act, 1883 (46 & 47 Vict. c. 52), s. 17 (6).

(*k*) *Ibid.*, s. 17 (7).

(*l*) *Ibid.*, s. 17 (8); Bankruptcy Act, 1890 (53 & 54 Vict. c. 71), s. 2 (1). If the debtor refuses to answer to the satisfaction of the registrar a question which the registrar allows, the registrar, not having the power to commit for contempt, has to report the refusal to the judge, and the debtor may be committed for contempt as if he had made default in answering before the judge (Bankruptcy Rules, r. 88 (1)). As to the appointment of shorthand writers and payment of costs so incurred, see *ibid.*, rr. 67, 67 A, 125, 125 A. In practice the whole of a debtor's examination is taken down, and as soon as practicable after the notes have been transcribed he has to attend at the Court to sign them. For form of memorandum by debtor of his public examination, see Bankruptcy Rules, Appendix, Forms, No. 47.

(*m*) *R.* v. *Scott* (1856), 25 L. J. (M. C.) 128; *R.* v. *Robinson* (1867), L. R. 1 C. C. R. 80; *Ex parte Schofield, Re Firth* (1877), 6 Ch. D. 230; *Re a Solicitor* (1890), 25 Q. B. D. 17. As to the use of such evidence after the death of the debtor, see Bankruptcy Act, 1883 (46 & 47 Vict. c. 52), s. 136.

(*n*) *I.e.*, those enumerated in s. 1 of the Larceny Act, 1901 (1 Edw. 7, c. 10), and ss. 77—84 of the Larceny Act, 1861 (24 & 25 Vict. c. 96); Bankruptcy Act, 1890 (53 & 54 Vict. c. 71), s. 27 (2). For such offences see title CRIMINAL LAW AND PROCEDURE.

(*o*) Bankruptcy Act, 1890 (53 & 54 Vict. c. 71), s. 27 (2).

(*p*) *R.* v. *Erdheim*, [1896] 2 Q. B. 260.

(*q*) *Re Butterfield* (1890), 7 Morr. 293.

(*r*) *Re Brünner* (1887), 19 Q. B. D. 572; *New, Prance and Garrard's Trustee* v. *Hunting*, [1897] 2 Q. B. 19.

SUB-SECT. 4. Public Examination.

An endeavour by bribery to induce a debtor to suppress evidence which it is his duty to give at his public examination is contempt of court (*s*).

Attempts to suppress evidence.

Conclusion of examination.

111. Where the court is of opinion that the affairs of the debtor have been sufficiently investigated, it is by order to declare that his examination is concluded, but the order is not to be made until after the day appointed for the first meeting of creditors (*t*).

SUB-SECT. 5.—*Duties and Liabilities of Debtor under Receiving Order.*

Duties of debtor.

112. The first duty of a debtor after a receiving order has been made against him is to attend on the official receiver at his offices immediately after the service of the order (*a*). The official receiver or some person deputed by him must forthwith hold a personal interview with the debtor for the purpose of investigating his affairs (*b*). The official receiver should then furnish him with instructions for the preparation of his statement of affairs (*c*). The debtor must prepare his statement of affairs; he must further, unless prevented by sickness or other sufficient cause, attend the first meeting of creditors, submit to such examination and give such information as the meeting may require (*d*), and must attend his public examination and answer questions (*e*). He must also give such inventory of his property, such list of his creditors and debtors, and of the debts due to and from them, submit to such examination in respect of his property or his creditors, attend such other meetings of his creditors, wait at such times on the official receiver, special manager, or trustee, execute such powers of attorney, conveyances, deeds, and instruments, and generally do all such acts in relation to his property and the distribution of the proceeds amongst his creditors as may be reasonably required by the official receiver, special manager, or trustee, or are prescribed by general rules, or may be directed by the court (*f*).

Debtor's default.

If the debtor wilfully fails to perform these duties, or to deliver up possession of any part of his property which is divisible amongst his creditors under the Act, and which is for the time being in his possession or under his control, to the official receiver or to the trustee, or to any person authorised by the court to take possession

(*s*) *Re Hooley, Rucker's Case* (1898), 5 Mans. 331.

(*t*) Bankruptcy Act, 1883 (46 & 47 Vict. c. 52), s. 17 (9); Bankruptcy Rules, Appendix, Forms, No. 48; *Re Williams* (1884), 1 Morr. 16; *Re Rigg* (1891), 7 T. L. R. 423.

(*a*) See note to the form of receiving order, Bankruptcy Rules, Appendix, Forms, Nos. 28 and 29; *ibid.*, r. 324 (3).

(*b*) *Ibid.*, r. 324 (2).

(*c*) *Ibid.* r. 324 (1).

(*d*) Bankruptcy Act, 1883 (46 & 47 Vict. c. 52), s. 24 (1). See p. 66, *ante*.

(*e*) See p. 71, *ante*.

(*f*) Bankruptcy Act, 1883 (46 & 47 Vict. c. 52), s. 24 (2). On the request of the official receiver he must furnish trading and profit and loss accounts and a cash and goods account for such period, not exceeding two years from the date of the receiving order, as the official receiver shall specify, or for a longer period if ordered by the court (Bankruptcy Rules, r. 338; *Re Cronmire, Ex parte Cronmire*, [1894] 2 Q. B. 246).

SUB-SECT. 5. Duties of Debtor under Order.

of it, he is guilty of a contempt of court, and may be punished accordingly in addition to any other punishment to which he may be subject (*g*).

Arrest of debtor.

113. A debtor may be arrested, and any books, papers, money, and goods in his possession may be seized, if, after the presentation of a petition by or against him, he absconds for the purpose of avoiding examination in respect of his affairs or of otherwise avoiding, delaying, or embarrassing proceedings in bankruptcy against him, or if there is probable cause for believing that he is about to remove his goods with a view of preventing or delaying possession being taken of them by the official receiver or trustee, or that he has concealed or is about to conceal or destroy any of his goods or any books, documents, or writings which might be of use to his creditors, or if, after service of a petition on him, or after a receiving order made against him, he removes any goods in his possession above the value of £5 without the leave of the official receiver or trustee, or if without good cause shown he fails to attend any examination ordered by the court (*h*).

Removal of property etc.

A number of acts done by a debtor who is adjudicated bankrupt with relation to the removal or concealment or non-discovery of his property and the falsification or suppression of books and documents relating to his property are criminal offences (*i*).

Acts which debtor under no obligation to do.

114. A bankrupt is under no obligation to submit to a medical examination with a view to a policy on his life being effected for the purpose of making saleable an asset forming part of his estate (*k*). If the bankrupt is a married woman and is the donee of a general power of appointment over property, she cannot be compelled to exercise the power in favour of her trustee, such a power not being the separate property of a married woman within the Married Women's Property Act, 1882 (*l*).

Nor will the powers of the court to commit for contempt be exercised, when it is alleged that an account furnished by the debtor is untrue. The proper course in such a case is to institute a prosecution under the Debtors Act, 1869 (*m*).

Committal of debtor.

The debtor may be committed for refusing to deliver up possession of property formerly belonging to him which the official receiver has sold to a purchaser (*n*). He may also be committed

(*g*) Bankruptcy Act, 1883 (46 & 47 Vict. c. 52), s. 24 (4). As to application and order to commit, see Bankruptcy Rules, rr. 6, 85—87.

(*h*) Bankruptcy Act, 1883 (46 & 47 Vict. c. 52), s. 25 (a), (b), (c), (d); Bankruptcy Rules, rr. 83 and 84, Appendix, Forms, Nos. 147 and 148. Doors may be broken open to effect the arrest (*Re Von Weissenfeld, Ex parte Hendry* (1892), 9 Morr. 30). The proceeds of an estreated bond in the case of a debtor arrested under this provision will go to the creditors as a general rule, and not to the Crown (*Re Gordon, Re Salmond*, [1903] 2 K. B. 164).

(*i*) See the Debtors Act, 1869 (32 & 33 Vict. c. 62), s. 11, and pp. 345 *et seq.*, *post*.

(*k*) *Re Garnett, Ex parte Bullock* (1885), 16 Q. B. D. 698; *Board of Trade* v. *Block* (1888), 13 App. Cas. 570.

(*l*) 45 & 46 Vict. c. 75, s. 1 (5); *Ex parte Gilchrist, Re Armstrong* (1886), 17 Q. B. D. 521. See p. 10, *ante*.

(*m*) *Re Davis, Ex parte Turnpenny* (1892), 9 Morr. 278.

(*n*) *Re Burgoyne, Ex parte Burgoyne* (1891), 8 Morr. 139.

SUB-SECT. 5. **Duties of Debtor under Order.**

for refusing to execute a power of attorney necessary to enable land out of the jurisdiction to be dealt with in the bankruptcy (*o*).

Redirection of letters.

115. After a receiving order has been made, the court, on the application of the official receiver or trustee, may from time to time order that for such time, not exceeding three months, as the court may think fit, letters addressed to the debtor at any place shall be redirected, sent, or delivered by the Postmaster-General or the officers acting under him to the official receiver or the trustee or otherwise as the court directs (*p*).

Allowance to debtor.

116. The official receiver while in the possession of the property of a debtor may make him such allowance out of his property for the support of himself and his family as may be just. In fixing the amount of the allowance, the assistance rendered by him in the management of his business or affairs may be taken into account (*q*).

Private examination of debtor and others.

117. In addition to the public examination to which all persons against whom a receiving order has been made are liable (*r*), the court may, on the application of the official receiver or trustee, summon before it the debtor, or his wife, or any person known or suspected to have in his possession any of the estate or effects belonging to the debtor, or supposed to be indebted to the debtor, or any person whom the court may deem capable of giving information respecting the debtor, his dealings or property, and the court may require any such person to produce any documents in his custody or power relating to the debtor, his dealings or property (*s*).

SUB-SECT. 6.—*Appointment of Special Manager.*

Special manager.

118. The effect of a receiving order is to constitute the official receiver manager as well as receiver of the debtor's estate (*t*), but he may, on the application of any creditor or creditors, appoint a special manager, if he is satisfied that the debtor's estate or business requires it. Should he decline to make the appointment the court will not interfere (*u*).

Powers and remuneration.

The special manager acts until he is removed or until a trustee is appointed, and has such powers, including any of the powers of a receiver, as may be intrusted to him by the official receiver (*a*).

(*o*) *Re G. W. Harris, Ex parte the Trustee* (1896), 3 Mans. 46, where the order was suspended for a fortnight to enable the bankrupt to execute the power; Bankruptcy Rules, r. 87.

(*p*) Bankruptcy Act, 1883 (46 & 47 Vict. c. 52), s. 26. See form of order, Bankruptcy Rules, Appendix, Forms, No. 168.

(*q*) Bankruptcy Rules, r. 325.

(*r*) See p. 71, *ante*.

(*s*) Bankruptcy Act, 1883 (46 & 47 Vict. c. 52), s. 27 (1). See also p. 140, *post*. See Bankruptcy Rules, rr. 61—66, 69, 70, 78. The deposition of a deceased debtor or wife, sealed with the seal of the Court, is admissible in evidence of the matters therein deposed to. See Bankruptcy Act, 1883, s. 136.

(*t*) Bankruptcy Act, 1883 (46 & 47 Vict. c. 52), s. 70 (1) (a).

(*u*) *Re Whitaker* (1884), 1 Morr. 36.

(*a*) Bankruptcy Act, 1883 (46 & 47 Vict. c. 52), s. 12 (1). See also p. 101, *post*.

SUB-SECT. 6. Appointment of Special Manager.

The remuneration of the special manager is such as the creditors by resolution at an ordinary meeting determine or, in default of such resolution, as may from time to time be fixed by the Board of Trade (*b*).

He must give security as the Board of Trade directs (*c*), and render to the official receiver an account verified by affidavit (*d*). When the account is approved by the official receiver, the totals of the receipts and payments are added to the official receiver's accounts (*e*).

Security and accounts.

He may, if authorised by the official receiver, raise money or make advances for the purposes of the estate in any case where, in the interests of the creditors, it appears necessary so to do (*f*).

Raising money and making advances.

He may be removed by the Board of Trade, if he fails to keep up security in the prescribed manner (*g*). The official receiver may also remove him, if his employment seems unnecessary or unprofitable to the estate, and must do so, if a special resolution of the creditors requires it (*h*).

Removal.

Where the official receiver as interim receiver appoints a special manager, the latter is entitled out of his receipts from the business to be reimbursed his expenses, including remuneration properly incurred by him in carrying it on until the dismissal of the petition (*i*).

Expenses.

SUB-SECT. 7.—*Rescission of Receiving Order.*

119. The court has power to rescind a receiving order under the general jurisdiction enabling it to review, rescind, or vary any order made by it under its bankruptcy jurisdiction (*k*). In deciding whether a receiving order should or should not be rescinded, the court generally acts on the same principles as when it considers whether an adjudication in bankruptcy should or should not be annulled (*l*).

Power of court to rescind receiving order.

If in the opinion of the court a receiving order ought not to have

Where court ought to rescind.

(*b*) Bankruptcy Act, 1883 (46 & 47 Vict. c. 52), s. 12 (3); Bankruptcy Rules, r. 343.

(*c*) Bankruptcy Act, 1883 (46 & 47 Vict. c. 52), s. 12 (2); Bankruptcy Rules, r. 342.

(*d*) Bankruptcy Act, 1883 (46 & 47 Vict. c. 52), s. 12 (2); Bankruptcy Rules, r. 344; Appendix, Forms, No. 106. If he receives remuneration for his services, no payment is to be allowed in his accounts in respect of the performance by any other person of the ordinary duties which are required by statute or rules to be performed by himself (Bankruptcy Act, 1883 (46 & 47 Vict. c. 52), s. 73 (1)). He may be ordered by the court to file his accounts within four days (*Re Jones, Ex parte Board of Trade* (1908), 98 L. T. 56).

(*e*) Bankruptcy Rules, r. 344.

(*f*) Bankruptcy Act, 1883 (46 & 47 Vict. c. 52), s. 70 (1) (b). As to the duty of the debtor to wait on the special manager and do such acts in relation to his property as the special manager may reasonably require, see *ibid.*, s. 24 (2), p. 74, *ante*.

(*g*) Bankruptcy Rules, r. 302.

(*h*) *Ibid.*, r. 331. A special manager may be committed for making default in obeying an order given by the Board of Trade or an official receiver under the authority of the Bankruptcy Acts (Bankruptcy Act, 1883 (46 & 47 Vict. c. 52), s. 102 (5)).

(*i*) *Re A. B. & Co.* (No. 2), [1900] 2 Q. B. 429.

(*k*) Bankruptcy Act, 1883 (46 & 47 Vict. c. 52), s. 104 (1).

(*l*) See *ibid.*, ss. 23 (1), (2), 35 (1), 104 (1); *Re Hester, Ex parte Hester* (1889), 22 Q. B. D. 632; *Re Dennis, Ex parte Dennis*, [1895] 2 Q. B. 630; and p. 90, *post*.

SUB-SECT. 7. Rescission of Receiving Order.

been made, then it ought to rescind the receiving order (*m*). Thus, if the presentation of the petition was an abuse of the process of the court, the receiving order ought to be rescinded (*n*). Any reason which would justify the court in refusing to make a receiving order is a reason for rescinding it (*o*).

If the debtor's debts are paid in full, the receiving order ought to be rescinded (*p*).

If the debtor enters into a composition or scheme of arrangement with his creditors (*q*) which is approved by the court, the receiving order must be discharged (*r*).

Where court has discretion.

120. In all other cases the court has a discretion; and even if all the creditors concur in the application for the rescission of a receiving order, the application will not be granted unless it appears that the proposed rescission is for the benefit of the creditors, and is not detrimental to commercial morality and the public at large or to the interests of future creditors of the debtor (*s*).

Arrangement not within the Acts.

If the ground of the application is that the debtor and the creditors have entered into an arrangement by which the creditors accept part payment of their debts in full discharge, the fact that the arrangement is one which cannot be brought within the terms laid down in the Bankruptcy Acts (*a*) is a very strong indication that it is not a scheme of the description which ought to be a bar to further proceedings in bankruptcy (*b*). But the court has jurisdiction to rescind a receiving order, where an arrangement is made otherwise than in pursuance of the provisions of the Bankruptcy Acts, though it will only do so with great caution and in special circumstances which make it clear that the arrangement is for the benefit of the creditors, and that the debtor has not been guilty of misconduct in relation to his insolvency (*c*).

Absence of debtor abroad.

The fact that a debtor against whom an order for the substituted

(*m*) See *Re Hester, Ex parte Hester* (1889), 22 Q. B. D. 632; *Re Farleigh* (1905), 21 T. L. R. 198.

(*n*) *Re Betts, Ex parte Official Receiver*, [1901] 2 K. B. 39; *Re Bond* (1888), 21 Q. B. D. 17. See p. 46, *ante*.

(*o*) *Re Hester, Ex parte Hester, supra*, at p. 636.

(*p*) Bankruptcy Act, 1883 (46 & 47 Vict. c. 52), s. 35 (1) (and see s. 36); *Re Perkins, Ex parte Perkins* (1890), 7 Morr. 78. If some of the creditors cannot be found, the receiving order can be rescinded on the payment of the amount of their debts into court (*Re Dennis, Ex parte Dennis*, [1895] 2 Q. B. 630).

(*q*) Under the Bankruptcy Act, 1890 (53 & 54 Vict. c. 71), s. 3 of which has taken the place of s. 18 of the Bankruptcy Act, 1883 (46 & 47 Vict. c. 52). See p. 79, *post*.

(*r*) Bankruptcy Rules, r. 208. The receiving order is discharged and in this case not rescinded. If the composition is annulled (see Bankruptcy Act, 1890 (53 & 54 Vict. c. 71), s. 3 (15)), the debtor may still be adjudicated bankrupt on the original petition (Bankruptcy Act, 1883 (46 & 47 Vict. c. 52), s. 23 (3)).

(*s*) *Ex parte Wemyss, Re Wemyss* (1884), 13 Q. B. D. 244; *Ex parte Leslie, Re Leslie* (1887), 18 Q. B. D. 619; *Re Dixon and Cardus, Ex parte Dixon and Cardus* (1888), 5 Morr. 291; *Re Hester, Ex parte Hester* (1889), 22 Q. B. D. 632; *Re Flatau, Ex parte Official Receiver*, [1893] 2 Q. B. 219; *Re Norris, Ex parte Norris* (1890), 7 Morr. 8; *Ex parte Carr, Re Carr* (1886), 35 W. R. 150.

(*a*) See the Bankruptcy Act, 1890 (53 & 54 Vict. c. 71), s. 3, and pp. 325 *et seq.*, *post*.

(*b*) *Re Dixon and Cardus, Ex parte Dixon and Cardus* (1888), 5 Morr. 291.

(*c*) *Re Izod, Ex parte Official Receiver*, [1898] 1 Q. B. 241.

service of the petition had been obtained was absent abroad during the bankruptcy proceedings and ignorant of them is not of itself a ground for rescinding a receiving order (*d*).

SUB-SECT. 7. Rescission of Receiving Order.

Pendency of bankruptcy proceedings outside jurisdiction.

121. The court may rescind a receiving order, if it appears on an application by the official receiver or by any creditor or other person interested that a majority of the creditors in number and value are resident in Scotland or Ireland, and that, from the situation of the property of the debtor or other causes, his estate and effects ought to be distributed among the creditors under the bankrupt or insolvent laws of Scotland or Ireland (*e*).

The pendency of bankruptcy proceedings in another country which is not the domicile of the debtor is no ground for rescinding a receiving order made against a debtor who has become amenable to the English bankruptcy laws, and who has assets within the jurisdiction (*f*).

Application to rescind.

122. The application to rescind a receiving order is usually made by the debtor, but it may be made by the official receiver (*g*). Notice of the application, together with a copy of the affidavits in support, must be served on the official receiver, where it is not made by him, not less than seven days before the day named in the notice for the hearing of the application, unless the court gives leave to the contrary (*h*).

SECT. 5.—*Compositions and Schemes of Arrangement under the Bankruptcy Acts.*

SUB-SECT. 1.—*Composition or Scheme before Adjudication.*

Proposal for scheme before adjudication.

123. A debtor against whom a receiving order has been made and who desires to make a proposal to his creditors for a composition or scheme of arrangement must lodge a copy of the proposal with the official receiver within four days after filing his statement of affairs, or such further time as the official receiver (*i*) or the Court (*k*) may allow.

The official receiver thereupon prepares a report on the proposal and summons a meeting of creditors to consider it, sending to each creditor a copy of the proposal and of the report (*l*), together with a form of proxy and a voting letter (*m*), that is to say, a form by which a creditor duly filling in and returning it not later than the day before the meeting may express his assent to or dissent from

(*d*) *Re Betty, Ex parte Betty* (1902), 46 Sol. Jo. 431.
(*e*) Bankruptcy Act, 1883 (46 & 47 Vict. c. 52), s. 14.
(*f*) *Re Artola Hermanos, Ex parte André Châle* (1890), 24 Q. B. D. 640. As to the pendency of bankruptcy proceedings in Scotland and Ireland, see *Ex parte Robinson, Re Robinson* (1883), 22 Ch. D. 816; *Ex parte McCulloch, Re McCulloch* (1880), 14 Ch. D. 716.
(*g*) *Re Bond* (1888), 21 Q. B. D. 17.
(*h*) Bankruptcy Rules, r. 134 A (No. 2).
(*i*) Bankruptcy Act, 1890 (53 & 54 Vict. c. 71), s. 3; Bankruptcy Rules, r. 196.
(*k*) *Re Netter* (1894), not reported, *per* BROUGHAM, Reg.
(*l*) Bankruptcy Act, 1890 (53 & 54 Vict. c. 71), s. 3 (2).
(*m*) *Ibid.*, s. 3 (4); Bankruptcy Act, 1883 (46 & 47 Vict. c. 52) s. 70 (1) (d). See Bankruptcy Rules, Appendix, Forms, No. 82.

SUB-SECT. 1. Composition or Scheme before Adjudication.

the proposal without personally attending the meeting. The meeting must be held before the public examination is concluded. The debtor may amend his proposal at the meeting if the official receiver thinks the proposed amendment is calculated to benefit the general body of creditors (*n*).

Acceptance of proposal.

124. A proposal is deemed to be accepted if it is supported by a majority in number and three-fourths in value of all the creditors who have proved (*o*).

Application for approval by court.

As soon as the proposal has been accepted the debtor or the official receiver (*p*) may apply to the court to approve it, and notice of the time appointed for hearing the application, which cannot be heard before the conclusion of the public examination (*q*), is given to each creditor who has proved his debt. If the debtor applies, he must give ten days' notice of the date to the official receiver (*r*), who in turn sends three days' notice to each creditor who has proved a debt (*s*). The official receiver also four days before the hearing files a report as to the terms of the proposal and the conduct of the debtor (*t*).

Hearing of application.

On the appointed day the official receiver's report is read to the court, and the court, after hearing the official receiver (*a*) and the trustee, if any, and any objections made by or on behalf of any creditor (*b*), approves or refuses to approve the proposal. Save for the purpose of correcting or supplying any accidental or formal error or omission, the court has no power to alter the proposal (*c*).

Conditions of approval.

Before granting its approval the court must be satisfied that the proposal was duly lodged and accepted by the creditors (*d*), and that it provides for the payment in priority of all preferential debts (*e*), and all proper fees, costs, charges, and expenses (*f*).

Refusal to approve.

If the court is of opinion that the proposal is not reasonable and calculated to benefit the general body of creditors, or if the conduct of the debtor has been such that if he were bankrupt and applying

(*n*) Bankruptcy Act, 1890 (53 & 54 Vict. c. 71), s. 3 (3).

(*o*) *Ibid.*, s. 3 (2). Creditors who do not vote are treated as dissenting.

(*p*) *Ibid.*, s. 3 (5). Bankruptcy Rules, r. 203, provides that no costs incurred by a debtor on an application for approval can be allowed out of the estate if approval be refused. Except, therefore, in a simple case where there is no risk of a refusal and there is money in hand, the official receiver will not apply for a date unless the debtor deposits the sum required to cover the court fees.

(*q*) Bankruptcy Act, 1890 (53 & 54 Vict. c. 71), s. 3 (6).

(*r*) Bankruptcy Rules, r. 198.

(*s*) *Ibid.*, r. 199.

(*t*) *Ibid.*, r. 201.

(*a*) Bankruptcy Act, 1890 (53 & 54 Vict. c. 71), s. 3 (7); Bankruptcy Rules, r. 202. The report is to be taken as *primâ facie* evidence of the facts stated therein (*Ex parte Campbell, Re Wallace* (1885), 15 Q. B. D. 213; *Re Bottomley, Ex parte Bottomley* (1893), 10 Morr. 262).

(*b*) Notwithstanding that such creditor may have voted for the proposal at the meeting (Bankruptcy Act, 1890 (53 & 54 Vict. c. 71), s. 3 (6)). There is no provision enabling creditors to speak in support of the proposal.

(*c*) Bankruptcy Rules, r. 207.

(*d*) *Ibid.*, r. 204.

(*e*) Bankruptcy Act, 1890 (53 & 54 Vict. c. 71), s. 3 (18). As to preferential debts, see Preferential Payments in Bankruptcy Act, 1888 (51 & 52 Vict. c. 62), s. 1, and p. 217, *post*.

(*f*) Bankruptcy Rules, r. 205.

for his discharge the court would be bound to refuse it, the court must refuse to approve the proposal (*g*).

If any facts are proved which if the debtor were bankrupt would require the court to refuse, suspend, or attach conditions to his discharge, the court cannot approve the proposal unless it provides reasonable security for payment of not less than 7*s*. 6*d*. in the pound upon all unsecured debts provable against the estate (*h*).

In any other case the court may either approve or refuse to approve the proposal (*i*).

Reasons for approval or refusal.

125. It appears therefore that the facts which the court has to take into consideration in dealing with the application for approval are on the one hand the conduct of the debtor from the point of view of public policy, and on the other hand the interests of the creditors (*k*). The wishes of the creditors may also be regarded, but they are not to override the discretion of the court (*l*). The court is not bound to approve the proposal in any case (*m*), but as a rule it should approve it if the terms are reasonable and beneficial to the general body of creditors, and the debtor has not been guilty of gross misconduct (*n*).

Approval may be refused if a large number of creditors have not tendered proofs, or if the proofs tendered require serious investigation (*o*), or if the resolution accepting the proposal has been carried only by the votes of creditors whose debts are to be released, withdrawn, or postponed, and who have no personal interest in the arrangement (*p*). Absolute good faith is necessary in every case where it is desired to bind a dissentient minority (*q*).

Contents of scheme.

126. So far as regards the scheme itself, the principal and necessary condition is that it shall disclose upon the face of it the whole arrangement with the unsecured creditors (*r*), not only for the consideration of the court, but also for the information of the creditors at the meeting (*s*).

Release of debts.

If, as frequently happens, it is intended that certain claims shall be released or withdrawn, the terms upon which the releases are secured ought to appear on the face of the scheme (*t*). A secret consideration for the withdrawal of a claim is fatal to a

(*g*) Bankruptcy Act, 1890 (53 & 54 Vict. c. 71), s. 3 (8).
(*h*) *Ibid.*, s. 3 (9). "Reasonable security" has been interpreted to mean "commercial probability" (*Re Bottomley, Ex parte Bottomley* (1893), 10 Morr. 262).
(*i*) *Ibid.*, s. 3 (10).
(*k*) *Re Barlow, Ex parte Thornber* (1886), 3 Morr. 304; *Re McTear, Ex parte McTear* (1888), 5 Morr. 182; *Ex parte Kearsley, Re Genese* (1886), 18 Q. B. D. 168; *Re Bottomley, Ex parte Bottomley, supra.*
(*l*) *Ex parte Campbell, Re Wallace* (1885), 15 Q. B. D. 213; *Ex parte Reed and Bowen, Re Reed and Bowen* (1886), 17 Q. B. D. 244.
(*m*) *Re Burr, Ex parte Board of Trade*, [1892] 2 Q. B. 467.
(*n*) *Re E. A. B.*, [1902] 1 K. B. 457; *Ex parte Kearsley, Re Genese, supra.*
(*o*) *Ex parte Rogers, Re Rogers* (1884), 13 Q. B. D. 438; *Re Burr, Ex parte Board of Trade, supra.*
(*p*) *Re Utley* (1901), 17 T. L. R. 349, *per* LINKLATER, Reg.
(*q*) *Ex parte Baum, Re Baum* (1878), 7 Ch. D. 719.
(*r*) *Re Pilling, Ex parte Board of Trade*, [1903] 2 K. B. 50.
(*s*) *Re Aron* (1905), 21 T. L. R. 693, *per* LINKLATER, Reg.
(*t*) *Re Pilling, supra.*

SUB-SECT. 1. Composition or Scheme before Adjudication.

scheme (*a*). It has been considered a favourable, although, perhaps, not indispensable, circumstance that such releases were not obtained by the debtor personally or with his knowledge (*b*). The releases should be absolute, and not conditional upon the approval of the scheme by the Court. It would not be easy to obtain the approval of a scheme depending upon conditional releases negotiated by the debtor, and it would only be possible where there is a full disclosure of all the facts and all the negotiations (*c*).

The number of withdrawals or releases must not bear so large a proportion to the total number of debts as to reduce the scheme to an abuse of the process of the Court (*d*). Such a scheme, in fact, could hardly be deemed beneficial to the general body of creditors, which in this connection should mean, it is conceived, the majority in number.

Unreasonable scheme.

A scheme is not reasonable unless it affords the creditors some advantage which they would not have if the debtor were adjudged bankrupt (*e*). A scheme which provides that the debtor shall not be discharged until the committee appointed under the scheme so resolve is unreasonable and *ultra vires* (*f*).

Security requisite.

127. The security required to be provided in cases where facts have been established which would require the court to suspend or qualify the debtor's discharge is not necessarily such a security as a reasonable man would care to invest in, but one that satisfies the court that there is a reasonable commercial probability that a sufficient sum will be realised under the scheme (*g*), within a reasonable time (*h*), to pay a composition of 7*s*. 6*d*. in the pound upon the unsecured debts provable against the estate at the date when the scheme comes before the court for approval (*i*).

Effect of refusal to approve.

128. If the court refuses to approve the proposal it may make an immediate order of adjudication, but it will only do so in an exceptional case (*k*).

Appeal against order.

An appeal against the order of approval or refusal may be lodged by any person aggrieved (*l*), including a creditor who has not

(*a*) *Re E. A. B.*, [1902] 1 K. B. 457. In *Wood* v. *Barker* (1865), L. R. 1 Eq. 139, the court set aside a secret bargain by which the bankrupt agreed to pay one creditor in full in consideration of the latter becoming surety for the payment of the composition. See also *Ex parte Milner*, *Re Milner* (1885), 15 Q. B. D. 605, and *Leicester* v. *Rose* (1803), 4 East, 372.

(*b*) *Re E. A. B.*, *supra*, and *Re Pilling*, *Ex parte Board of Trade*, [1903] 2 K. B. 50.

(*c*) *Re Flew*, *Ex parte Flew*, [1905] 1 K. B. 278.

(*d*) *Re Utley* (1901), 17 T. L. R. 349, *per* LINKLATER, Reg.

(*e*) *Ex parte Bischoffsheim*, *Re Aylmer* (1887), 19 Q. B. D. 33; *Re Browne and Wingrove*, *Ex parte the Debtors*, [1890] W. N. 131.

(*f*) *Ex parte Clark*, *Re Clark* (1884), 13 Q. B. D. 426.

(*g*) *Re Bottomley*, *Ex parte Bottomley* (1893), 10 Morr. 262, where the scheme was approved, but the creditors received nothing.

(*h*) *Re Paine*, *Ex parte Paine*, [1891] W. N. 208; *Re Flew*, *Ex parte Flew*, *supra*.

(*i*) *Re E. A. B.*, *supra*; *Re Baines*, *Ex parte Board of Trade* (1902), 86 L. T. 691.

(*k*) *Re Pilling*, *supra*; and *Re Flew*, *Ex parte Flew*, *supra*, at p. 285, referring to *Re Burr*, *Ex parte Board of Trade*, [1892] 2 Q. B. 467, where such an order was made.

(*l*) Bankruptcy Act, 1883 (46 & 47 Vict. c. 52), s. 104.

tendered a proof at the time of the first hearing (*m*). The Board of Trade and the trustee have also a right of appeal (*n*). The Court of Appeal, however, is very loath to interfere with the exercise by the court of first instance of its discretionary power of approval, and will only do so if it be clearly wrong (*o*).

SUB-SECT. 1. Composition or Scheme before Adjudication.

Form of approval.

129. The approval of a proposal is testified by attaching the seal of the court to the proposal, or by embodying the terms in an order of court (*p*); and a certificate of the official receiver that a composition or scheme has been duly accepted and approved is, in the absence of fraud, conclusive as to its validity (*q*).

SUB-SECT. 2.—*Effect of Approval of Scheme by Court.*

Approved scheme, how far binding.

130. A composition or scheme, once approved, is binding on all creditors (*r*), including the Crown (*s*), so far as relates to any debts provable in bankruptcy, even in a case where from the nature of his debt the creditor is precluded from receiving a dividend (*t*). It is, however, not binding on any creditor so far as regards a liability from which the debtor if adjudged bankrupt would not be discharged by an order of discharge, unless such creditor consents to the composition or scheme (*a*). Moreover, the debtor is not released from any liability under a judgment in an action for seduction, or under an affiliation order, or under a judgment against him as co-respondent in a matrimonial cause, except so far and subject to such conditions as the court expressly orders (*b*).

The acceptance of a composition or scheme does not release any person, other than the debtor, who would not be released by an order of discharge in the case of the debtor's bankruptcy (*c*).

Discharge of receiving order.

When a composition or scheme is approved, the court discharges the receiving order. Thereupon the official receiver, subject to the payment of all proper fees, costs, charges, and expenses, delivers over the debtor's property to the debtor or to the trustee (as soon as he has given the necessary security) or to the person to whom under the arrangement the property is to be assigned. The official receiver must also account to the debtor or to the trustee, as the case may be (*d*). If a trustee is not appointed in the scheme,

(*m*) *Re Langtry* (1894), 1 Mans. 169.
(*n*) Bankruptcy Rules, r. 202; *Re Burr, Ex parte Board of Trade*, [1892] 2 Q. B. 467.
(*o*) *Ex parte Rogers, Re Rogers* (1884), 13 Q. B. D. 438; *Ex parte Campbell, Re Wallace* (1885), 15 Q. B. D. 213; *Ex parte Kearsley, Re Genese* (1886), 17 Q. B. D. 1; and see *Re Burr, supra*, where the appeal was successful.
(*p*) Bankruptcy Act, 1890 (53 & 54 Vict. c. 71), s. 3 (11).
(*q*) *Ibid.*, s. 3 (13).
(*r*) *Ibid.*, s. 3 (12).
(*s*) Bankruptcy Act, 1883 (46 & 47 Vict. c. 52), s. 150.
(*t*) *Seaton* v. *Lord Deerhurst*, [1895] 1 Q. B. 853.
(*a*) Bankruptcy Act, 1883 (46 & 47 Vict. c. 52), ss. 19, 30; and see Debtors Act, 1869 (32 & 33 Vict. c. 62), s. 15.
(*b*) Bankruptcy Act, 1890 (53 & 54 Vict. c. 71), s. 3 (12). Compare *ibid.*, s. 10, p. 269, *post*.
(*c*) *Ibid.*, s. 3 (19). This refers, *e.g.*, to sureties. As to the effect of an order of discharge, see pp. 267 *et seq.*, *post*.
(*d*) Bankruptcy Rules, rr. 208, 336.

SUB-SECT. 2. Effect of Approval of Scheme.

or if the appointed trustee declines to act, the official receiver becomes trustee (*e*).

Trustee under scheme.

131. A trustee appointed under a composition or scheme to administer the debtor's property or to distribute the composition must give security in like manner as if he were a trustee in bankruptcy (*f*), and he is also subject to the same regulations and has the same powers as to the discovery of a debtor's property by means of examination (*g*) and, so far as the nature of the case permits, as to the administration of the property (*h*). Unless, however, the terms of the scheme expressly so provide, the after-acquired property of the debtor will not vest in the trustee (*i*).

Proof of debts.

132. Creditors claiming under a composition or scheme must prove their debts in the same way as in a bankruptcy (*k*); and if any claim be disputed, the court may direct that the amount which would be payable in respect thereof must be secured in such manner as the court directs until the determination of the claim (*l*).

Enforcement of scheme.

133. No action to enforce payment of a composition will lie against the debtor or the trustee (*m*). This does not, however, apply to the surety for a composition (*n*). The provisions of a composition or scheme may be enforced by order of the court upon the application of any person interested, and disobedience to the order is a contempt of court (*o*).

Annulment of scheme.

134. Further, if default is made in payment of any instalment under the composition or scheme, or if the court is satisfied that the composition or scheme cannot, in consequence of legal difficulties or for any sufficient cause, proceed without injustice or undue delay to the creditors or to the debtor, or that the approval of the court has been obtained by fraud, the court may if it think fit, on the application of the official receiver or the trustee or any creditor, adjudge the debtor bankrupt and annul the composition or scheme, but without prejudice to the validity of anything duly done under the composition or scheme (*p*). The court will not, however, in the absence of fraud, exercise the power of adjudging the debtor bankrupt if it can see plainly that the creditors can gain nothing by it, but will do so if there is a probability of gain (*q*).

(*e*) Bankruptcy Rules, r. 209.
(*f*) *Ibid.*, r. 210; and see p. 109, *post.*
(*g*) Bankruptcy Act, 1890 (53 & 54 Vict. c. 71), s. 3 (16).
(*h*) *Ibid.*, s. 3 (17).
(*i*) *Re Croom*, [1891] 1 Ch. 695.
(*k*) Bankruptcy Rules, r. 215.
(*l*) *Ibid.*, r. 214.
(*m*) *Ibid.*, r. 211.
(*n*) *Ex parte Mirabita, Re Dale* (1875), L. R. 20 Eq. 772; *Ex parte Monkhouse, Re Dale* (1875), 1 Ch. D. 287.
(*o*) Bankruptcy Act, 1890 (53 & 54 Vict. c. 71), s. 3 (14); Bankruptcy Rules, Appendix, Forms, Nos. 68—70.
(*p*) Bankruptcy Act, 1890 (53 & 54 Vict. c. 71), s. 3 (15).
(*q*) *Ex parte Moon, Re Moon* (1887), 19 Q. B. D. 669; *Re Webster, Ex parte Foster & Co.* (1886), 3 Morr. 132; *Ex parte Godfrey, Re Lazarus* (1887), 18 Q. B. D. 670, a case of composition after adjudication; and *Re Hardy*, [1896] 1 Ch. 904, where the debtor had died.

SUB-SECT. 2. Effect of Approval of Scheme.

When the debtor is thus adjudged bankrupt any debt provable in other respects that has been contracted before the adjudication is provable in the bankruptcy (*r*); and unless the court otherwise directs, the annulment of the composition or scheme forthwith without any special order vests the property of the debtor (*s*) in the official receiver as trustee (*t*), and the trustee under the composition or scheme must duly account to him (*a*). Annulment has also the effect of discharging any surety for the composition from his liability (*b*).

Effect of annulment.

SUB-SECT. 3.—*Composition after Adjudication.*

Proposal for scheme after adjudication.

135. When a debtor has been adjudged bankrupt the creditors may at any time after the adjudication, and before he obtains his discharge (*c*), resolve to entertain a proposal for a composition or scheme of arrangement, and thereupon the same proceedings are taken and the same consequences ensue as in the case of a proposal before adjudication (*d*). The official receiver must summon the meeting of creditors and report on the proposal, the like majority is required for its acceptance, and the proposal must be approved by the court after consideration of its terms and the conduct of the bankrupt and subject to the like conditions as to security for the composition. If the court approves the composition or scheme it may, if in its discretion it thinks fit (*e*), annul the adjudication and vest the property of the bankrupt in him or in such other person and subject to such conditions as the court may appoint (*f*). The only difference in procedure and in the effect of approval seems to be that if the public examination has been concluded before the meeting it need not necessarily be reopened (*g*), and that in case of default, injustice, undue delay, or fraud, an application to adjudge the debtor bankrupt again and annul the composition or scheme may be made by any person interested, and not only by the official receiver, trustee, or creditors (*h*).

SECT. 6.—*Adjudication Order.*

SUB-SECT. 1.—*Making of Adjudication Order.*

When adjudication order may be made.

136. An order adjudicating a debtor, by or against whom a bankruptcy petition has been presented, bankrupt may be

(*r*) Bankruptcy Act, 1890 (53 & 54 Vict. c. 71), s. 3 (15).
(*s*) That is the property in its then existing state. There is no relation back of the trustee's title, as in an ordinary bankruptcy (*Re McHenry, Ex parte McDermott* (1888), 21 Q. B. D. 580).
(*t*) Bankruptcy Rules, r. 212.
(*a*) *Ibid.*, r. 213.
(*b*) *Walton* v. *Cook* (1888), 40 Ch. D. 325.
(*c*) *Re Beer* (1903), 19 T. L. R. 218, affirmed by Court of Appeal on other grounds, [1903] 1 K. B. 628.
(*d*) Bankruptcy Act, 1883 (46 & 47 Vict. c. 52), s. 23 (1); Bankruptcy Act, 1890 (53 & 54 Vict. c. 71), s. 6.
(*e*) *Re Sullivan and Hughes* (1904), 20 T. L. R. 393. It is doubtful if annulment can be bargained for in the scheme (*Re Beer, Ex parte Beer* (1903), 88 L. T. 335, *per* COZENS-HARDY, L.J., at p. 337.
(*f*) Bankruptcy Act, 1883 (46 & 47 Vict. c. 52), s. 23 (2).
(*g*) *Re Hencke* (1906), 22 T. L. R. 338, *per* HOPE, Reg.
(*h*) Bankruptcy Act, 1883 (46 & 47 Vict. c. 52), s. 23 (3).

SUB-SECT. 1. Making of Order.

made in the following cases: on the debtor's application at the time of the making of the receiving order against him or at any time afterwards (*i*); where the creditors at the first meeting of creditors convened after the receiving order pass an ordinary resolution (*k*) that the debtor be adjudged bankrupt, or pass no resolution, or if they do not meet, or if a composition or scheme is not accepted and approved within fourteen days after the conclusion of the public examination (*l*); where a quorum of creditors does not attend the first meeting or one adjournment of it, or where the official receiver satisfies the court that the debtor has absconded or does not intend to propose a composition or scheme (*m*); where a composition or scheme is not accepted by the creditors at the first meeting of creditors or one adjournment of it (*n*); where the debtor without reasonable excuse fails to make and submit his statement of affairs (*o*); where the public examination of the debtor is adjourned *sine die* (*p*); where default is made in the payment of an instalment under a composition or scheme under the Bankruptcy Acts (*q*), or the court is satisfied that by reason of legal difficulties or other sufficient cause the composition or scheme cannot proceed without injustice or delay to the creditors, or that the court's approval was obtained by fraud (*r*).

Summary cases.

137. In summary cases an adjudication order will be made where the debtor fails to lodge a proposal for a composition or scheme, or where the court is satisfied from the report of the

(*i*) Bankruptcy Rules, r. 190.

(*k*) See p. 65, *ante*.

(*l*) Bankruptcy Act, 1883 (46 & 47 Vict. c. 52), s. 20 (1). Though by this section in the events mentioned the court "shall" adjudge the debtor bankrupt, yet it would seem not absolutely obligatory on the Court to do so (*Re Pinfold, Ex parte Pinfold*, [1892] 1 Q. B. 73). At all events, an adjournment may be granted for sufficient reason (*Re Lord Thurlow, Ex parte Official Receiver*, [1895] 1 Q. B. 724); but the court has no jurisdiction to grant an adjournment merely for the purpose of delay or to enable the creditors to consider afresh abortive proposals for a composition (*Re Pinfold, supra*). Though the court when rejecting a composition or scheme may make an immediate adjudication order, yet it will do so only in exceptional cases (*Re Flew, Ex parte Flew*, [1905] 1 K. B. 278; compare *Re Burr, Ex parte Board of Trade*, [1892] 2 Q. B. 467, where an immediate order was made, as to which see 9 Morr. at p. 146).

(*m*) Bankruptcy Rules, r. 191, on the application of a creditor or of the official receiver.

(*n*) *Ibid.*, r. 192, on the application of the official receiver or of any person interested.

(*o*) Bankruptcy Act, 1883 (46 & 47 Vict. c. 52), s. 16 (3).

(*p*) Bankruptcy Rules, r. 192 A. In this case no notice to the debtor is necessary.

(*q*) Bankruptcy Act, 1890 (53 & 54 Vict. c. 71), s. 3 (15); Bankruptcy Act, 1883 (46 & 47 Vict. c. 52), s. 23 (3).

(*r*) Bankruptcy Act, 1890 (53 & 54 Vict. c. 71), s. 3 (15); Bankruptcy Act, 1883 (46 & 47 Vict. c. 52), s. 23 (3). An adjudication in such case will not prejudice the validity of anything done under the composition or scheme, and debts, provable in other respects, contracted before the order of adjudication will be provable in the bankruptcy (*ibid.*). In cases under s. 3, *supra*, the application may be made by the official receiver, the trustee, or a creditor: under s. 23, *supra*, by any person interested. As to property vesting in the official receiver and as to accounting for property to him or the trustee in bankruptcy where an adjudication order is made, see Bankruptcy Rules, rr. 212, 213.

official receiver that he does not intend to propose one, or that his proposal is not reasonable or beneficial to the general body of creditors, or that he has absconded (*s*). SUB-SECT. 1. Making of Order.

138. An order of adjudication may be made by the registrar of the court (*t*). Application for the order must be made to the judge or registrar, and notice in writing of the time and place for hearing the application must in general be given to the debtor (*a*). But if his public examination has been adjourned *sine die*, or in any case in which the court may think fit, he may be adjudged bankrupt without any notice being given to him (*b*). In the case of a firm the order is made, not against the firm, but against the partners individually (*c*). If the debtor is abroad the Court may direct in what manner the order is to be served on him (*d*). Notice of the order must be given by the registrar to the Board of Trade (*e*), who gazette it and cause it to be advertised in a local paper (*f*). Practice and procedure.

A copy of the *London Gazette* containing the notice of the order is conclusive evidence of the order having been duly made and of its date (*g*), not only against the immediate parties, such as the creditors and debtor, but as against strangers (*h*), subject to this, that strangers have the right to appeal against the order if they are parties aggrieved (*i*), and if necessary an extension of time to appeal will be granted to a stranger if it is necessary to prevent injustice (*k*).

SUB-SECT. 2.—*Effect of Adjudication Order.*

139. Upon the making of an adjudication order the property of the debtor becomes divisible amongst his creditors and vests in a trustee (*l*), who is the official receiver (*m*), unless and until a Effect of order.

(*s*) Bankruptcy Rules, r. 273 (4). The report of the official receiver is *primâ facie* evidence of its contents. For summary cases, see p. 294, *post*.

(*t*) Bankruptcy Act, 1883 (46 & 47 Vict. c. 52), s. 99 (2) (a). See also, as to the preparation of the order, Bankruptcy Rules, rr. 37 A, 37 B, and for form of order, *ibid.*, Appendix, Forms, Nos. 55, 55 a, and r. 193 (1).

(*a*) As a rule two days' notice of an application for adjudication should be given to the debtor; but see *Re Ponsford, Ex parte Ponsford*, [1904] 2 K. B. 704.

(*b*) Bankruptcy Rules, r. 192 A.

(*c*) *Ibid.*, r. 264.

(*d*) *Ibid.*, r. 195.

(*e*) *Ibid.*, rr. 193 (2), 282; and see Appendix, Forms, No. 174.

(*f*) Bankruptcy Act, 1883 (46 & 47 Vict. c. 52), s. 20 (2); Bankruptcy Rules, rr. 193 (2), 280. In summary cases, unless the Board of Trade direct, there is no advertisement in a local paper (r. 273 (1)). As to form of advertisement, see Appendix, Forms Nos. 31 and 32.

(*g*) Bankruptcy Act, 1883 (46 & 47 Vict. c. 52), s. 132. But it is not notice to all the world of the adjudication (*Palmer* v. *Locke* (1881), 18 Ch. D. 381, at p. 386).

(*h*) *Ex parte Learoyd, Re Foulds* (1878), 10 Ch. D. 3.

(*i*) *Ex parte Ellis, Re Ellis* (1876), 2 Ch. D. 797; *Ex parte Learoyd, supra.* As to "parties aggrieved," see p. 301, *post*.

(*k*) *Re Tucker* (1879), 12 Ch. D. 308. The official receiver may be a party aggrieved by the refusal of an adjudication order (*Ex parte Board of Trade, Re Reed, Bowen & Co.* (1887), 19 Q. B. D. 174). As to appeals generally, see pp. 301 *et seq.*, *post*.

(*l*) Bankruptcy Act, 1883 (46 & 47 Vict. c. 52), s. 20 (1).

(*m*) *Ibid.*, s. 54 (1). See also p. 102, *post*.

SUB-SECT. 2. **Effect of Order.**

trustee is chosen by the creditors or by the Board of Trade and certified by the Board of Trade (*n*).

When order operates to cause forfeiture.

Where a debtor himself presents the bankruptcy petition upon which the receiving order and adjudication order are made, he does not thereby commit a breach of a covenant in a lease not to assign, inasmuch as the adjudication order does not follow the petition and receiving order automatically, but is a matter for the discretion of the court (*o*). But a petition so presented followed by a receiving order and adjudication would bring into operation the forfeiture clause of a will or settlement declared to take effect upon the beneficiary "alienating or incumbering or agreeing to alienate or incumber his share" (*p*).

Order is not a conveyance of property.

140. An adjudication order is not a conveyance of property to the trustee within the Middlesex Registry Act, 1708, or the Land Registry (Middlesex Deeds) Act, 1891 (*q*), as the property passes not by virtue of the order, but by force of the Bankruptcy Act, 1883 (*r*). No registration at the Land Registry is therefore necessary where the official receiver is the trustee of the bankrupt's property, but if another trustee is appointed by the creditors the certificate issued to him by the Board of Trade must be registered as a conveyance (*r*).

SUB-SECT. 3.—*Disqualifications of the Bankrupt.*

Appointment for which bankruptcy disqualification.

141. An adjudication of bankruptcy renders the bankrupt disqualified for being or acting as a member of either House of Parliament (*s*). He is also disqualified for being or acting as a justice of the peace (*t*); for being elected to or holding or exercising the office of mayor, alderman, or councillor (*a*), or that of guardian

(*n*) Bankruptcy Act, 1883 (46 & 47 Vict. c. 52), s. 21.

(*o*) *Re Riggs, Ex parte Lovell*, [1901] 2 K. B. 16.

(*p*) *Re Cotgrave*, [1903] 2 Ch. 705. The petition is in effect an alienation (*ibid.*). See also *Re Amherst* (1872), L. R. 13 Eq. 464, under the Bankruptcy Act, 1869 (32 & 33 Vict. c. 71); *Ex parte Dawes, Re Moon* (1886), 17 Q. B. D. 275. As to effect of annulment of adjudication on such a clause, see p. 92, *post*.

(*q*) 7 Anne, c. 20; 54 & 55 Vict. c. 64.

(*r*) *Re Calcott and Elvin*, [1898] 2 Ch. 460; Bankruptcy Act, 1883 (46 & 47 Vict. c. 52), ss. 20, 21, and 54. As to registration generally, see title REAL PROPERTY AND CHATTELS REAL.

(*s*) Bankruptcy Act, 1883 (46 & 47 Vict. c. 52), s. 32. See also s. 124, by which privilege of Parliament is no protection against bankruptcy. By the unrepealed ss. 6—8 of the Bankruptcy Disqualification Act, 1871 (34 & 35 Vict. c. 50), the bankruptcy of a peer is certified by the Court to the Speaker of the House of Lords and the Clerk of the Crown in Chancery, and is communicated to the House and noted in its journals. During the disqualification no writ of summons is issued to the peer, and he is guilty of a breach of privilege if he sits or votes or attempts to sit or vote in the House.

In the case of a member of the House of Commons, where the disqualifications from bankruptcy are not removed within six months, the Court certifies the same to the Speaker, whereupon the member's seat becomes vacant. On such vacancy the Speaker, or other persons appointed by him to act when the office of Speaker is vacant or during his absence from the realm, will issue a warrant for the election of a new member (Bankruptcy Act, 1883, s. 33, incorporating stat. 24 Geo. 3, c. 26, in part). See Bankruptcy Rules, Appendix, Forms, No. 169. See generally title PARLIAMENT.

(*t*) Bankruptcy Act, 1883 (46 & 47 Vict. c. 52), s. 32 (1) (c).

(*a*) *Ibid.*, s. 32 (1) (d). As to a mayor, alderman, or councillor compounding

SUB-SECT. 3. Disqualifications of Bankrupt.

or overseer of the poor, member of a sanitary authority or of a highway or burial board, or select vestry (*b*), or county council (*c*); and if he is adjudged bankrupt whilst holding any of these offices, his office thereupon becomes vacant (*d*).

These disqualifications extend to all parts of the United Kingdom (*e*), but not retrospectively (*f*).

An election under the Municipal Corporations Act, 1882, of a disqualified person can only be questioned by petition (*g*), but the continuance in office of such a person may be questioned by writ of *quo warranto* (*h*).

A person is disqualified for being elected to or being a member or chairman of a parish council, or of a district council other than a borough council, or of a board of guardians, if within five years before his election or since his election he has been adjudged bankrupt, or compounded or arranged with his creditors (*i*).

Insolvency of trustee.

If a trustee in bankruptcy becomes bankrupt, or even has a receiving order made against him, his office becomes vacant (*k*).

Generally a court may remove a trustee who becomes bankrupt (*l*), and restrain a bankrupt executor from acting (*m*).

Bankrupt solicitor.

The registrar of solicitors may now refuse a certificate to an undischarged bankrupt (*n*).

Duration and removal of disqualification.

142. No disqualification under s. 32 of the Bankruptcy Act, 1883, or s. 9 of the Bankruptcy Act, 1890, is to exceed five years from the date of any order of discharge granted to a bankrupt (*o*). It is removed and ceases if and when the adjudication order is annulled (*p*), or the bankrupt obtains from the court with his

or arranging with creditors, see Municipal Corporations Act, 1882 (45 & 46 Vict. c. 50), s. 39; and compare Bankruptcy Act, 1883 (46 & 47 Vict. c. 52), s. 149.

(*b*) Bankruptcy Act, 1883 (46 & 47 Vict. c 52), s. 32 (1) (e).

(*c*) Bankruptcy Act, 1890 (53 & 54 Vict. c. 71), s. 9.

(*d*) Bankruptcy Act, 1883 (46 & 47 Vict. c. 52), s. 34.

(*e*) *Ibid.*, s. 32 (3).

(*f*) *Re School Board Election for the Parish of Pulborough*, [1894] 1 Q. B. 725.

(*g*) 45 & 46 Vict. c. 50, s. 87, and see *R.* v. *Beer*, [1903] 2 K. B. 693. See generally title LOCAL GOVERNMENT.

(*h*) *R.* v. *Beer*, *supra*; and see title CROWN PRACTICE. See also *Richardson* v. *Methley School Board*, [1893] 3 Ch. 510.

(*i*) Local Government Act, 1894 (56 & 57 Vict. c. 73), s. 46. A request and an order for administration under s. 122 of the Bankruptcy Act, 1883 (46 & 47 Vict. c. 52), is a composition within the meaning of this section (*Bradfield* v. *Cheltenham Guardians* (1906), 13 Mans. 207; and compare *Lowe* v. *Lourie* (1902), 18 T. L. R. 553).

(*k*) Bankruptcy Act, 1883 (46 & 47 Vict. c. 52), s. 85.

(*l*) Trustee Act, 1893 (56 & 57 Vict. c. 53), s. 25.

(*m*) *Bowen* v. *Phillips*, [1897] 1 Ch. 174.

(*n*) 6 Edw. 7, c. 24; and see title SOLICITORS. As to the practice before that Act, see *Re a Solicitor*, [1902] 1 K. B. 128.

As to the bankruptcy of a company director and the holding of shares in his own right, see *Dawson* v. *African Consolidated Land and Trading Co.*, [1898] 1 Ch. 6; *Sutton* v. *English and Colonial Produce Co.*, [1902] 2 Ch. 502; and compare *Boschoek Proprietary Co., Ltd.* v. *Fuke*, [1906] 1 Ch. 148.

(*o*) Bankruptcy Act, 1890 (53 & 54 Vict. c. 71), s. 9.

(*p*) See p. 91, *post*.

SUB-SECT. 3. Disqualifications of Bankrupt.

discharge a certificate that the bankruptcy was caused by misfortune without any misconduct on his part (*q*).

An application for an order for removal of a disqualification must be heard in open court (*r*), and in High Court cases may be heard by the registrar (*s*).

SUB-SECT. 4.—*Annulment of Adjudication Order.*

When order may be annulled.

143. An adjudication order may be annulled—(1) where it ought never to have been made; (2) where the court is satisfied that the debts have been paid in full (*t*); and (3) where a composition or scheme has been accepted and approved under the Bankruptcy Acts (*u*).

Orders which should not have been made.

144. An adjudication order made against a married woman who is not trading separately from her husband may be annulled (*w*), and so may an order made under proceedings which are an abuse of the process of the court or foreign to the purposes of the Bankruptcy Acts (*x*), or an order made under a defective petition which has not been amended before the making of the receiving order or adjudication order (*a*), or upon evidence stating that the debtor had absconded which turned out to be untrue (*b*), or where the debtor was dead at the time when bankruptcy proceedings were taken against him (*c*).

Payment in full.

145. Payment in full means payment in cash to the amount of 20*s.* in the pound, and the assent of the creditors to an annulment of the bankruptcy by having given to the bankrupt absolute releases of their debts will not of itself be sufficient to entitle the bankrupt to have his bankruptcy annulled (*d*).

(*q*) Bankruptcy Act, 1883 (46 & 47 Vict. c. 52), s. 32 (2). The granting of such certificate is for the discretion of the Court, but the bankrupt may appeal from a refusal of it (*ibid.*). It will not be granted unless there has been misfortune as distinguished from, and without, misconduct. Thus a certificate was refused where the bankruptcy was the result of a libel published by the bankrupt for which he was imprisoned (*Re Burgess, Ex parte Burgess* (1887), 4 Morr. 186), and where it was caused by inability to pay the costs of an unsuccessful divorce petition instituted by the bankrupt (*Re Lord Colin Campbell* (1888), 20 Q. B. D. 816). See also *Re Grahame* (1889), 5 T. L. R. 259.

(*r*) Bankruptcy Rules, r. 6 (c).

(*s*) Bankruptcy Act, 1883 (46 & 47 Vict. c. 52), s. 99 (3). See Bankruptcy Rules, Appendix, Forms, No. 66.

(*t*) Bankruptcy Act, 1883 (46 & 47 Vict. c. 52), s. 35 (1).

(*u*) As to such compositions and schemes, see p. 79, *ante*.

(*w*) *Re Helsby, Ex parte Helsby* (1893), 1 Mans. 12.

(*x*) *Ex parte Painter, Re Painter*, [1895] 1 Q. B. 85.

(*a*) *Ex parte Coates, Re Skelton* (1877), 5 Ch. App. 979, under Bankruptcy Act, 1869 (32 & 33 Vict. c. 71), where the adjudication was made in the debtor's absence. Compare *Re Fiddian, Squire & Co., Ex parte Fiddian, Squire & Co.* (1892), 9 Morr. 95, where the court allowed, before the making of the receiving order, an amendment and re-service of the petition.

(*b*) This course was followed in *Re Bright, Ex parte Wingfield and Blew*, reported on another point, [1903] 1 K. B. 735, the proceedings being set out on p. 736.

(*c*) *Ex parte Geisel, Re Stanger* (1882), 22 Ch. D. 436 (Bankruptcy Act, 1869 (32 & 33 Vict. c. 71)).

(*d*) Bankruptcy Act, 1883 (46 & 47 Vict. c. 52), s. 35; *Re Gyll, Ex parte Board of Trade* (1888), 5 Morr. 272; *Re Hester, Ex parte Hester* (1889), 22

A disputed debt will be considered as paid in full by the bankrupt entering into a bond, in such sum and with such sureties as the court approves, to pay the amount which may be recovered in an action for the debt with the costs. Where the creditor cannot be found the debt due to him will be paid in full if it is paid into court (*e*).

Disputed debts.

In the case of a disputed debt the Statute of Limitations will begin to run from the date of the annulment, but where the creditor cannot be found, and the debt is paid into court, the statute will not run. If, after the lapse of six years, the official receiver reports to the court that the creditor or his representatives cannot be found, the court may order repayment of the money to the debtor, upon his giving security for its replacement if a claim to it should afterwards be made (*f*).

Statute of Limitations.

Even if the debts are paid in full, the annulment of the adjudication order is a matter for the discretion of the court, and it may be refused where the debtor has been guilty of grave misconduct in relation to his affairs (*g*) or of misconduct which would be a ground for refusing an application by the debtor for an order of discharge (*h*).

Annulment refused.

When an order annulling an adjudication is made in the High court the senior bankruptcy registrar, and in a county court the registrar, must forthwith give notice thereof to the Board of Trade, in order that the same may be gazetted and published in a local paper (*i*).

Notice of annulment to Board of Trade.

SUB-SECT. 5.—*Effect of Annulment.*

146. It does not follow because the order of adjudication is annulled that the receiving order is rescinded and the petition dismissed. If an order of adjudication is annulled on the ground that it ought not to have been made, separate proceedings by the debtor must be taken to obtain a rescission of the receiving order and dismissal of the bankruptcy petition.

Effect on receiving order and petition.

147. The annulment of an adjudication order does not affect the validity of sales and dispositions of property or of payments duly

Dispositions of property.

Q. B. D. 632 ; *Re Dixon and Cardus, Ex parte Dixon and Cardus* (1888), 5 Morr. 291. In *Re Burnett, Ex parte Official Receiver* (1894), 1 Mans. 89, where W., a friend of the bankrupt, on his behalf took an assignment of the debts amounting to £1,600 for £140, and another friend on the like behalf paid W. the full amount of the debts, which were then re-assigned to the bankrupt, this was held not to be payment in full by the bankrupt. See also *Re Keet*, [1905] 2 K. B. 666 ; and compare *Re Flatau, Ex parte Official Receiver*, [1893] 2 Q. B. 219 (rescission of receiving order).

(*e*) Bankruptcy Act, 1883 (46 & 47 Vict. c. 52), s. 36.

(*f*) *Re Dennis, Ex parte Dennis*, [1895] 2 K. B. 630.

(*g*) Bankruptcy Act, 1883 (46 & 47 Vict. c. 52), s. 35 ; *Re Taylor, Ex parte Taylor*, [1901] 1 K. B. 744. See also *Re Beer, Ex parte Beer*, [1903] 1 K. B. 628, where, after the termination of the period for which the bankrupt's discharge had been suspended, the court refused, on the ground of the bankrupt's misconduct, to approve a proposal, made conditionally on annulment, for a composition under s. 23 which, along with the dividend paid in the bankruptcy, would have given the creditors 10*s.* in the pound.

(*h*) *Re Keet, supra.*

(*i*) Bankruptcy Act, 1883 (46 & 47 Vict. c. 52), s. 35 (3) ; Bankruptcy Rules, r. 194 ; *ibid.*, Appendix, Forms, No. 57.

SUB-SECT. 5. **Effect of Annulment.**

made or acts done by the official receiver, trustee, or any person acting under their authority, or by the court, but the property of the debtor vests in such person as the court may appoint, or, where no appointment is made, reverts to the debtor for all his estate or interest in it, on such terms and subject to such conditions, if any, as the court may order (*j*). In the absence of a special order, the debtor would appear to be remitted to his original rights in respect of his property (*k*).

Rejected proof.

The rejection of a proof by the trustee in bankruptcy is an act done by him within the meaning of the section, so that the claim for the debt which was the subject of the proof cannot be enforced after annulment (*l*).

Forfeitures under will or settlement.

148. In the case of a gift by will or settlement of rent or other income to a donee defeasible on its becoming payable to some other person, the forfeiture takes effect, notwithstanding annulment, if before the annulment it becomes the duty of the trustees of the will or settlement to make a payment which, but for the forfeiture clause, the trustee in bankruptcy of the donee would be entitled to receive (*m*). In such case the trustee need not have actually claimed the income (*n*). If, however, the annulment order is made, or if, though the order is not actually made, there are circumstances which entitle the donee to claim it as a matter of right (*o*) before any income becomes payable, there will be no forfeiture (*p*).

Forfeiture under lease.

Where by a lease there is a right of re-entry on bankruptcy, it is doubtful whether an action commenced to enforce that right could be defeated by an annulment of the adjudication order after the commencement of the action (*q*), but it is submitted that the

(*j*) Bankruptcy Act, 1883 (46 & 47 Vict. c. 52), s. 35 (2).

(*k*) *Bailey* v. *Johnson* (1872), L. R. 7 Exch. 263, under Bankruptcy Act, 1869 (32 & 33 Vict. c. 71), s. 81, where the debtor after annulment was allowed to set off against the claim of the trustee of the petitioning creditors, bankers who had themselves become bankrupt, the amount of the proceeds of the sale of the debtor's estate paid into their bank. See also *Re Leonard, Re Chidley* (1875), 1 Ch. D. 177, and *West* v. *Baker* (1875), 1 Ex. D. 44, both under Bankruptcy Act, 1869 (32 & 33 Vict. c. 71), where, after annulment for the purposes of composition proceedings, the debtor's property became vested in a person other than the debtor. In the former case such person held it discharged from an execution which would have been bad in bankruptcy; in the latter a debt provable in bankruptcy was allowed to be set off against a demand for a debt due to the debtor. See also *Ex parte Allard, Re Simons* (1881), 16 Ch. D. 505, and *Re Croom, England* v. *Provincial Assets Co.*, [1891] 1 Ch. 695, where the annulment was followed by a scheme; *Re Newman, Ex parte Official Receiver*, [1899] 2 Q. B. 587, where the receiving order against the trustee in bankruptcy was rescinded.

(*l*) *Brandon* v. *McHenry*, [1891] 1 Q. B. 538 (Bankruptcy Act, 1869 (32 & 33 Vict. c 71)). See also *Seaton* v. *Lord Deerhurst*, [1895] 1 Q. B. 853.

(*m*) *Re Parnham's Trusts* (1872), L. R. 13 Eq. 413; *Robertson* v. *Richardson* (1885), 30 Ch. D. 623; *Metcalfe* v. *Metcalfe* (1889), 43 Ch. D. 633, and on appeal [1891] 3 Ch. 1; *Re Loftus-Otway*, [1895] 2 Ch. 235.

(*n*) *Robertson* v. *Richardson, supra.*

(*o*) *Metcalfe* v. *Metcalfe* (1889), 43 Ch. D. 633, at p. 642.

(*p*) *White* v. *Chitty* (1865), L. R. 1 Eq. 372; *Lloyd* v. *Lloyd* (1866), L. R. 2 Eq. 722; *Trappes* v. *Meredith* (1869), L. R. 9 Eq. 229, reversed, 7 Ch. App. 248; *Re Parnham's Trusts* (1877), 46 L. J. (CH.) 80; *Samuel* v. *Samuel* (1879), 12 Ch. D. 152.

(*q*) *Smith* v. *Gronow*, [1891] 2 Q. B. 394.

right to enforce the forfeiture which has already arisen would not be defeated (*r*). SUB-SECT. 5. Effect of Annulment.

149. As on annulment nothing reverts to the debtor which was not in the trustee, the rights of the debtor to property will be barred by the Real Property Limitation Acts if the rights of the trustee had become so barred (*s*). Statute-barred rights.

150. Where an adjudication order is annulled on approval by the court of a scheme of arrangement, the debtor may be readjudicated bankrupt if he has concealed property distributable among his creditors (*t*). Readjudication.

151. The annulment order does not relieve the trustee from his liability as trustee to account to the Board of Trade for his transactions in respect of the estate (*a*). Trustee's liability.

SUB-SECT. 6.—*Practice on Annulment.*

152. Notice of an application to annul an adjudication, together with copies of affidavits in support of it, must, unless the court otherwise directs, be served on the official receiver seven days before the day appointed for hearing the application (*b*). Application to annul.

If there is an appeal from a refusal by the court to annul, notice of the appeal must be served on the trustee of the bankrupt's property and on the petitioning creditor (*c*). Notice of appeal.

If the annulment order is not completed within a week of the making of it, the registrar must complete it, unless the court otherwise directs (*d*). Completion of order by registrar.

In a proper case an application for an order to annul an adjudication on the ground that it ought not to have been made can be made after the lapse of the time allowed for appealing against the order of adjudication (*e*). Time for application.

SECT. 7.—*Administration in Bankruptcy of the Estate of a Deceased Insolvent.*

SUB-SECT. 1.—*Petition.*

153. A petition for the administration of the estate of a deceased insolvent debtor according to the law of bankruptcy may be Requisites for petition.

(*r*) Compare *Metcalfe* v. *Metcalfe* 1889), 43 Ch. D. 633; *Re Loftus-Otway*, [1895] 2 Ch. 235.

(*s*) *Markwick* v. *Hardingham* (1880), 15 Ch. D. 339.

(*t*) *Ex parte Jarvis, Re Spanton* (1879), 10 Ch. D. 179 (Bankruptcy Act, 1869 (32 & 33 Vict. c. 71), s. 28).

(*a*) Bankruptcy Rules, r. 194 (3).

(*b*) *Ibid.*, r. 134 A (No. 2).

(*c*) *Ex parte Ward, Re Ward* (1880), 15 Ch. D. 292, a decision under the Bankruptcy Act, 1869 (32 & 33 Vict. c 71), where a receiving order did not precede an adjudication. The official receiver would also appear to be a necessary party. Compare *Re Webber, Ex parte Webber* (1889), 24 Q. B. D. 313 (application to rescind receiving order).

(*d*) See Bankruptcy Rules, rr. 37 A and 37 B, as to the drawing up of the order by the parties.

(*e*) *Ex parte Geisel, Re Stanger* (1882), 22 Ch. D. 436, and *Re Helsby, Ex parte Helsby* (1893), 1 Mans. 12, where the application to annul was made after the lapse of more than six months from the date of adjudication.

SUB-SECT. 1. Petition.

presented by a creditor or creditors (*f*) whose debt would have been sufficient for a bankruptcy petition against the debtor if alive (*g*).

Presentation and service.

It must be presented to the court within whose jurisdiction the debtor resided or carried on business for the greater part of the six months immediately preceding his death (*h*), and served, unless the court otherwise directs, on each executor who has proved the will, or on each person who has taken out letters of administration, and on such other person as the court thinks fit (*i*).

Petition before legal personal representative constituted.

It is sufficient if, at the date of the order for administration, there is a legally constituted representative of the deceased before the court, though, at the date of the service of the petition on him, letters of administration or probate had not been granted (*k*).

Discretion of court.

154. On proof of service of the petition and of the petitioning creditor's debt the court may make an order for the administration of the estate in bankruptcy, unless it is satisfied that there is a reasonable probability that the estate will be sufficient for the payment of the debts of the deceased, or it may on cause shown dismiss the petition with or without costs (*l*). The court has the same discretion in dealing with the petition as in the case of a debtor who is alive (*m*), and it may make an order notwithstanding a resolution of a meeting of creditors against an administration in bankruptcy (*n*). Before the Bankruptcy Act, 1890, the court could not make an order until two months had elapsed from the date of probate or letters of administration, unless the legal personal representative concurred, or unless proof was given of an act of bankruptcy committed by the deceased within three months of his death, but no such concurrence or proof is now necessary (*o*).

Effect of order on legal personal representative.

155. Notice to the legal personal representative of the deceased (*p*) of a petition is, in the event of an order for administration being made, deemed notice of an act of bankruptcy, so that

(*f*) Bankruptcy Act, 1883 (46 & 47 Vict. c. 52), s. 125 (10); Bankruptcy Rules, r. 274, Appendix, Forms, No. 11.

(*g*) Bankruptcy Act, 1883 (46 & 47 Vict. c. 52), s. 125 (1). If the debt remains, it is immaterial that the remedy to recover it is altered (*Re Outram, Ex parte Ashworth* (1893), 10 Morr. 288).

(*h*) Bankruptcy Act, 1883 (46 & 47 Vict. c. 52), s. 125 (10). Where the debtor, a domiciled Englishman, had resided not in England, but in Africa, during the six months before his death, the High Court was held to have jurisdiction to make an order (*Re Evans, Ex parte Evans* (1890), 7 Morr. 297; compare Bankruptcy Act, 1883, s. 95, and *Senhouse* v. *Mawson* (1885), 52 L. T. 745, where deceased lived in Scotland for more than six months before his death.

(*i*) Bankruptcy Rules, r. 276.

(*k*) *Re Sleet, Ex parte Sleet*, [1894] 2 Q. B. 797.

(*l*) Bankruptcy Act, 1883 (46 & 47 Vict. c. 52), s. 125 (2).

(*m*) *Re Outram, Ex parte Ashworth, supra.*

(*n*) *Re Sleet, Ex parte Sleet, supra.* As to the order, see Bankruptcy Rules, r. 277, Appendix, Forms, No. 42.

(*o*) Bankruptcy Act, 1883 (46 & 47 Vict. c. 52), s. 125 (3), as amended by Bankruptcy Act, 1890 (53 & 54 Vict. c. 71), ss. 21 (1), 29. Where the estate of a deceased partner is being administered under the Act, and the other partner is adjudged bankrupt, the estates may be consolidated (*Re C. Greaves, Re W. H. Greaves*, [1904] W. N. 124).

(*p*) *Semble*, notice of a petition does not affect other parties.

SUB-SECT. 1. Petition.

no payment or transfer made thereafter by him operates as a discharge between him and the official receiver or trustee. Apart from this, no payment made, or act or thing done, in good faith by the legal personal representative before the date of the order is invalidated (*q*).

Transfer of administration proceedings.

156. No petition may be presented after proceedings have been commenced in any court of justice for the administration of the estate of the deceased, but such court may, even without the application of any creditor (*r*), on proof that the estate is insolvent, transfer the proceeding to the court exercising bankruptcy jurisdiction (*s*). The making of the transfer is a matter for the discretion of the court, the predominant considerations being those of convenience, delay, and expense (*a*), and it may be made even after judgment in the action for administration when the insolvency is clear (*b*).

On the transfer being made, the court exercising bankruptcy jurisdiction may make an order for administration of the estate, and the like consequences follow as if the order had been made on the petition of a creditor (*c*), the court taking up the proceedings as nearly as may be at the point at which they have arrived in the transferring court (*d*).

SUB-SECT. 2.—*Effect and Consequences of Order for Administration.*

Vesting of property.

157. Upon the making of the order for administration of the estate in bankruptcy the debtor's property vests in the official receiver of the court as trustee, and unless the creditors exercise the right to appoint a trustee in bankruptcy (*e*), the official receiver forthwith proceeds to realise and distribute it in accordance with the provisions of the Bankruptcy Acts (*f*).

(*q*) Bankruptcy Act, 1883 (46 & 47 Vict. c. 52), s. 125 (9).

(*r*) Since the Bankruptcy Act, 1890 (53 & 54 Vict. c. 71), such application is not necessary; see ss. 21 (2), 29 of that Act.

(*s*) Bankruptcy Act, 1883 (46 & 47 Vict. c. 52), s. 125 (4).

(*a*) *Re Weaver* (1885), 29 Ch. D. 236; *Re York* (1887), 36 Ch. D. 233; *Re Baker* (1890), 44 Ch. D. 262. In the first of these cases the assets were small and the creditors few. The two other cases showed (*inter alia*) that the existence of the right of retainer which an executor has in Chancery would not, without more, be a ground for refusing a transfer, nor, on the other hand, for making one. See also *Re Briggs* (1891), 7 T. L. R. 494, 572; but as to retainer, see title EXECUTORS AND ADMINISTRATORS. Again, the mere fact that the executor in the Chancery proceedings does not plead the Statute of Limitations is not a ground for transfer (*Re Baker, supra*). See as to retention in the Chancery Division where there are difficult questions of law, *Re Kenward*, (1906), 94 L. T. 277.

(*b*) *Re York, supra.*

(*c*) Bankruptcy Act, 1883 (46 & 47 Vict. c. 52), s. 125 (4).

(*d*) *Re York, supra*, at p. 239. The costs, charges, and expenses properly incurred in the action will be included in the testamentary expenses in and about the debtor's estate, which may be allowed to the legal personal representative; see p. 98, *post.*

(*e*) Bankruptcy Act, 1890 (53 & 54 Vict. c. 71), s. 21 (3); Bankruptcy Rules, r. 279 A.

(*f*) Bankruptcy Act, 1883 (46 & 47 Vict. c. 52) s. 125 (5). A dividend in the hands of the official receiver payable to a creditor cannot be attached under R. S. C., Ord. 45, r. 1 (*Prout* v. *Gregory, Sharp, Garnishee* (1889), 24 Q. B. D. 281).

SUB-SECT. 2. **Effect of Order for Administration.**

Account rendered by executor.

The executor or legal personal representative of the deceased must lodge forthwith, in duplicate, with the official receiver an account of his dealings with and administration (if any) of the deceased's estate, and also, in duplicate, a list of the creditors, a statement of the assets and liabilities, and such other information as may be required by the official receiver; each account, list, and statement being in accordance with the practice of the Chancery Division (*g*).

Executor *de son tort.*

Where the court finds on the report of the official receiver that there is no executor or legal personal representative, the aforesaid documents must be lodged by any person who appears to the court from such report to have taken on himself the administration of the property of the deceased or any part thereof, or to have otherwise intermeddled with it (*h*).

Application of Bankruptcy Acts.

158. Generally the provisions of the Bankruptcy Acts, which concern the proof of debts, the property available for payment of debts, the effect of bankruptcy on antecedent transactions, and the realisation and distribution of property, apply, subject to modifications hereafter mentioned, to an administration order just as they do to an ordinary adjudication order (*i*).

Again, trustees and committees of inspection may be appointed as in ordinary bankruptcies, the provisions of the Acts as to trustees and committees of inspection in bankruptcy being applicable to any so appointed (*k*). And where a meeting of creditors is summoned for the appointment of a trustee, the provisions of the Acts as to meetings and persons entitled to vote, of the Bankruptcy Rules as to creditors, meetings, trustees and committees of inspection, and as to small bankruptcies, where the property is not likely to exceed 300*l.* in value, are applicable (*l*).

SUB-SECT. 3.—*Limitations to the Operation of the Order.*

Scope of order.

159. The order which the court may make "for the administration of the estate of the deceased debtor" (*m*) applies only to the mode of administration, and not to the subject-matter which is to be administered. It applies only to the debtor's estate, and does not apply to the property of third persons (*n*). Thus the provisions of the Act relating to the avoidance of a voluntary settlement (*o*) are not applicable to an administration order, for those provisions relate, not to

(*g*) Bankruptcy Rules, r. 278. The expense of preparing, making, verifying and lodging any account, list, or statement will, after taxation, be allowed out of the estate on production of the allocatur (*ibid.*).

(*h*) *Ibid.*, r. 279.

(*i*) Bankruptcy Act, 1883 (46 & 47 Vict. c. 52), s. 125 (6). Thus s. 38 of the same Act (set-off in the case of mutual dealings) is applicable, though on one side the liability under the dealings does not ripen into a debt till after the death of the deceased (*Watkins* v. *Lindsay & Co.* (1898), 5 Mans. 25); and so is s. 55 (disclaimer) (*Re Mellison, Ex parte Day* (1906), 13 Mans. 201).

(*k*) Bankruptcy Act, 1890 (53 & 54 Vict. c. 71), s. 21 (3). See pp. 108, 113, *post.*

(*l*) Bankruptcy Rules, r. 279 A. As to meetings, see p. 65, *ante;* as to small bankruptcies, see p. 294, *post.*

(*m*) See Bankruptcy Act, 1883 (46 & 47 Vict. c. 52), s. 125 (1).

(*n*) *Ex parte Official Receiver, Re Gould* (1887), 19 Q. B. D. 92.

(*o*) Bankruptcy Act, 1883 (46 & 47 Vict. c. 52), s. 47.

SUB-SECT. 3. Limitations to Operation of Order.

the estate of the debtor, but to the property of the trustees of the settlement (*p*).

Nor, again, are the provisions (*q*) which restrict the rights of an execution creditor under an incomplete execution or attachment applicable (*r*). Nor may the court, acting under an administration order, save by consent, order a stranger to pay over moneys obtained by a garnishee order after the death of the deceased (*s*).

Again, the provisions (*t*) relating to discovery of the debtor's property are not available in an administration (*a*).

SUB-SECT. 4.—*Preferential Rights and Claims.*

Executor's right of retainer.

160. It is now settled that an executor's right to retain legal (*b*) assets in payment of his debt is not affected by an administration order within these provisions. His debt is in effect extinguished by his receipt of such assets sufficient to pay himself and creditors of a higher degree, nor, when he has such assets, need he assert his title to them till some one challenges it (*c*).

If through mistake as to his rights he hands over the assets to the trustee, he may, on discovering his mistake, compel the trustee, if he still holds them, to return them, and he is not prevented from doing so by the fact that he has, through a like mistake, proved for his debt (*d*).

The executor need not sell the assets, but may retain them *in specie*, if they are clearly of less value than his debt (*e*).

The right of retainer does not extend to assets which the executor has not got in, or which he has not in his possession actually or constructively (*f*), before notice of a petition for an administration order (*g*).

(*p*) *Ex parte Official Receiver, Re Gould* (1887), 19 Q. B. D. 92. As to voluntary settlements, see p. 275, *post*.

(*q*) See Bankruptcy Act, 1883 (46 & 47 Vict. c. 52), s. 45, and p. 272, *post*.

(*r*) *Hasluck* v. *Clark*, [1899] 1 Q. B. 699; and compare *Watkins* v. *Barnard*, [1897] 2 Q. B. 521, where the observations appear to be *obiter*. In that case, the sheriff, after a sale under an execution for more than £20, received within fourteen days notice of a bankruptcy petition, and then the debtor died, when the petition was by consent dismissed; a petition under s. 125 being then presented, of which the sheriff received notice after the fourteen days, and an administration order being made, it was held that the execution creditor's rights were not affected.

(*s*) *Re Crowther, Ex parte Ellis* (1887), 20 Q. B. D. 38, following the practice of the Chancery Division in an administration action, as to which see title EXECUTORS AND ADMINISTRATORS.

(*t*) See Bankruptcy Act, 1883 (46 & 47 Vict. c. 52), s. 27, and pp. 140 *et seq.*, *post*.

(*a*) *Re Hewitt, Ex parte Hannah and Walter Hewitt* (1885), 15 Q. B. D. 159.

(*b*) Not equitable (*Re Rhoades, Ex parte Rhoades*, [1899] 2 Q. B. 347, at p. 354). As to executor's right of retainer, see title EXECUTORS AND ADMINISTRATORS.

(*c*) *Re Rhoades, supra*. This case goes farther than *Re Gilbert, Ex parte Gilbert*, [1898] 1 Q. B. 282, where there was a declared intention to retain before the trustee took possession.

(*d*) *Re Rhoades, Ex parte Rhoades, supra*, where the proof was withdrawn on the discovery of the mistake.

(*e*) *Re Gilbert, Ex parte Gilbert, supra*.

(*f*) *Pulman* v. *Meadows*, [1901] 1 Ch. 233.

(*g*) *Re Williams, Ex parte Lewis and Evans* (1891), 8 Morr. 65. As to notice, see Bankruptcy Act, 1883 (46 & 47 Vict. c. 52), s. 125 (9), pp. 94, 95, *ante*.

SUB-SECT. 4. Preferential Rights and Claims.

161. In the administration of the debtor's estate regard must be had to any claim by the legal personal representative of the deceased to payment of the proper funeral and testamentary expenses incurred by him in and about the debtor's estate (*h*).

Funeral and testamentary expenses.

Testamentary expenses include all costs, charges and expenses properly incurred in an administration action (*i*), and it would appear that they may be taxed as between solicitor and client (*k*).

Any such claim by the legal personal representative is a preferential debt under the order and payable in full out of the estate in priority to all other debts (*l*).

Carrying on business.

162. Creditors of the deceased must, in general, be paid in priority to any claim by an executor or executrix for indemnity in respect of debts incurred in carrying on the deceased's business (*m*).

Distress.

163. A landlord or other person to whom rent is due has the same right of distress after an order for administration as he has after an order of adjudication, the latter order including the former for this purpose (*n*).

Preferential payments.

The preferential payments referred to in s. 1 of the Preferential Payments in Bankruptcy Act, 1888, are also applicable under such an order (*o*).

SUB-SECT. 5.—*Surplus.*

Disposition of surplus.

164. Any surplus remaining in the hands of the official receiver or trustee, after payment of all the debts, costs of administration, and interest as provided by the Bankruptcy Acts in case of bankruptcy (*p*), is to be paid to the legal personal representative of the debtor's estate, or otherwise dealt with as may be prescribed (*q*).

SECT. 8.—*Official Receiver.*

SUB-SECT. 1.—*Appointment and Removal.*

Functions of official receiver.

165. Attached to each bankruptcy court is an officer styled the official receiver of the district of the court, whose duty it is both to

(*h*) Bankruptcy Act, 1883 (46 & 47 Vict. c. 52), s. 125 (7); *Re King*, [1904] 1 Ch. 363; *Sharp* v. *Lush* (1879), 10 Ch. D. 468.

(*i*) *Re York* (1887), 36 Ch. D. 233. See also *Re Clemow*, [1900] 2 Ch. 182.

(*k*) *Re Chapman, Ex parte Clark* (1894), 71 L. T. 778. See *Re Evans, Ex parte Evans*, [1891] 1 Q. B. 143, where on the dismissal of an appeal by an executrix against an order for transfer to the bankruptcy court, her costs were refused.

(*l*) Bankruptcy Act, 1883 (46 & 47 Vict. c. 52), s. 125 (7). The Preferential Payments in Bankruptcy Act, 1888 (51 & 52 Vict. c. 62), which does not affect this sub-section (see ss. 2, 3 of that Act), applies to an administration in Chancery (*Re Heywood*, [1897] 2 Ch. 593).

(*m*) *Ex parte Yates, Re Millard* (1895), 72 L. T. 823.

(*n*) Bankruptcy Act, 1883 (46 & 47 Vict. c. 52), s. 42 (2). See p. 291, *post*. Sect. 42 does not apply to an administration in Chancery (*Re Fryman* (1888), 38 Ch. D. 468).

(*o*) Preferential Payments in Bankruptcy Act, 1888 (51 & 52 Vict. c. 62), s. 1 (6). See p. 217, *post*. For the purposes of s. 125 of the Bankruptcy Act, 1883 (46 & 47 Vict. c. 52), the date of the death is equivalent to the date of the receiving order (*ibid.*).

(*p*) As to proof for interest to date of receiving order, see p. 232, *post*. In case of a surplus, interest at 4 per cent. per annum will also be allowed on all debts proved from the date of the receiving order (Bankruptcy Act, 1883 (46 & 47 Vict. c. 52), s. 40 (5)).

(*q*) *Ibid.*, s. 125 (8).

SUB-SECT. 1. Appointment and Removal.

assume control over the estate of a debtor against whom a receiving order has been made and to take a leading part in the investigation of the debtor's conduct, and also to perform other duties in connection with estates which come under the jurisdiction of the bankruptcy court and with the conduct of debtors. For the district of the High Court there are three official receivers, and many of the county court districts are for bankruptcy purposes united into districts for each of which an official receiver is appointed.

Appointment.

166. Official receivers of debtors' estates are appointed, and may be removed, by the Board of Trade; but though they act under the general authority and direction of the Board of Trade, they are also officers of the courts to which they are respectively attached (*r*). They cannot, whilst in office, be members of the House of Commons, nor, directly or indirectly, by themselves, their clerks or partners, act as solicitors in bankruptcy or in prosecutions of debtors by order of the court (*s*).

Districts.

Their number and the districts to be assigned to them are fixed by the Board of Trade with the concurrence of the Treasury. As a rule only one is appointed for each district, but an official receiver may be appointed to act for more than one district. Where more than one is attached to a court that court will distribute the receiverships of the estates amongst them in the prescribed manner, and such one of them as is for the time being appointed for any particular estate will be the official receiver of that estate (*t*).

Deputies.

167. A deputy may be appointed by the Board of Trade to discharge the duties of an official receiver during any temporary vacancy in the office, or the temporary absence of the official receiver through illness or otherwise. So too, on the application of the official

(*r*) Bankruptcy Act, 1883 (46 & 47 Vict. c. 52), s. 66 (1). They must account to the Board of Trade and pay over all the moneys and deal with all securities as the Board may direct (*ibid.*, s. 70 (3)). Notice of an order removing an official receiver must be communicated by letter to the registrar of the court, and upon the removal of an official receiver, and upon his death or resignation, all estates, rights and powers vested in him will, without any conveyance or transfer, vest in such official receiver as the Board of Trade may appoint (Bankruptcy Rules, r. 322). Judicial notice is taken of the appointment of an official receiver (*ibid.*, r. 321 (1)).

(*s*) Bankruptcy Act, 1883 (46 & 47 Vict. c. 52), s. 116. This prevents the official receiver from acting as solicitor even for himself (*Re Taylor, Ex parte Official Receiver* (1885), 2 Morr. 127).

(*t*) Bankruptcy Act, 1883 (46 & 47 Vict. c. 52), s. 66 (2), (3). Where there are two or more official receivers the estates are assigned as the Board of Trade may require, and the Board may require that an estate assigned to one may be transferred permanently or otherwise to another, in which case the transfer will be made by the registrar (Bankruptcy Rules, r. 323 A; for the form of order of transfer see *ibid.*, Appendix, Forms, No. 176). But where there are two or more official receivers attached to the same court, one of them, even without a transfer, may (subject to the directions and control of the Board) perform the duties of any other (*ibid.*, r. 323 B). Their remuneration is fixed by the Board of Trade with the concurrence of the Treasury (Bankruptcy Act, 1883 (46 & 47 Vict. c. 52), s. 128), and the Treasury, in aid of any sums voted by Parliament, may from time to time issue to the Board of Trade, out of fees, stamps and investments under the Act, sums necessary to meet the estimated charges of the Board of Trade for salaries and expenses under the Act (*ibid.*, s. 77).

SUB-SECT. 1. Appointment and Removal.

receiver himself, a deputy may be appointed to act for him for a period not exceeding two months on such terms as to remuneration or otherwise as may be prescribed (*u*).

Assistants.

Assistant official receivers may also be appointed by the Board of Trade to represent, subject to the directions of the Board of Trade, official receivers, both in court and in administrative and other matters (*v*).

In sudden emergencies, where there is no official receiver capable of acting, the registrar may act for the official receiver (*w*).

Delegation of duties.

The Board of Trade determines what duties must be performed by the official receiver in person, and what he may delegate to his clerks or other persons in his regular employment or under his official control (*x*).

SUB-SECT. 2.—*Duties and Powers.*

Debtor's conduct.

168. The duties of the official receiver relate both to the debtor's conduct and to the administration of his estate (*y*). As to the former his duty is to investigate the debtor's conduct and report to the court whether there is reason to believe that he has committed any misdemeanor under either the Debtors Act, 1869, or any amendment of it, or the Bankruptcy Acts (*z*), or any act which would justify the court in refusing, suspending or qualifying an order for his discharge (*a*); to make such other reports about his conduct as the Board of Trade may direct (*b*); to take such

(*u*) Bankruptcy Act, 1883 (46 & 47 Vict. c. 52), s. 67. An order may be made by the Board of Trade in any special case, for reasons to be stated in the order, and provided no additional expense is incurred, that any specified officer of the Board shall be capable of discharging any portion of the duties of the official receiver which it is expedient that the official receiver should not perform (Bankruptcy Act, 1890 (53 & 54 Vict. c. 71), s. 14). Generally, where a person is appointed to act as deputy for or in place of the official receiver, notice of the appointment and of its duration is given by the Board of Trade to the registrar (Bankruptcy Rules, r. 321 (2)), and the person appointed will, whilst in office, have all the status, rights and powers, and be subject to the liabilities, of an official receiver (*ibid.*, r. 321 (3)).

(*v*) Bankruptcy Rules, r. 329. They are also officers of the court, which is to take judicial notice of their appointment, and they may be removed by the Board of Trade (*ibid.*).

(*w*) *Ibid.*, r. 330. Further, in the absence of the official receiver any duly authorised officer of the Board of Trade or clerk of the official receiver authorised by him may, by leave of the court, act for the official receiver, and take part for him in the public examination of a debtor or in a private examination under s. 27 of the Act of 1883, or on any unopposed application to the court (*ibid.*, r. 323 c).

(*x*) *Ibid.*, r. 328.

(*y*) Bankruptcy Act, 1883 (46 & 47 Vict. c. 52), s. 68 (1).

(*z*) For these misdemeanors, see pp. 345 *et seq.*, *post*. As to the duties of the official receiver, see *Re Dunn*, [1902] 1 K. B. 107.

(*a*) Bankruptcy Act, 1883 (46 & 47 Vict. c. 52), s. 69 (1). See pp. 248 *et seq.*, *post*.

(*b*) *Ibid.*, s. 69 (2). The official receiver reports on compositions and schemes (see pp. 79 *et seq.*, *ante*), and has a general power to report as to the debtor's conduct before the rescission of the receiving order or the annulment of the adjudication order (*Ex parte Leslie, Re Leslie* (1887), 18 Q. B. D. 619, 623). The report is *primâ facie* evidence only when it is the personal report of the official receiver, and interference by others in the preparation of it is not permitted (*Re Bottomley, Ex parte Bottomley* (1893), 10 Morr. 262). The report is absolutely

part in his public examination as may be directed by the Board of Trade (*c*); to act as directed by the Board of Trade in prosecuting fraudulent debtors (*d*).

Debtor's estate.

As to the debtor's estate, it is the official receiver's duty to act as interim receiver of it (*e*), and as manager of it if no special manager is appointed (*f*); and, where such manager is appointed, to authorise him, when necessary in the interests of the creditors, to raise or find money for the purposes of the estate (*g*); to summon and preside at the first meeting, and to issue proxies for use at meetings (*h*); to report to the creditors any proposal made by the debtor for liquidating his affairs (*i*); to insert the advertisements

privileged (*Bottomley* v. *Brougham*, [1908] 1 K. B. 584, where an action for libel, based upon a part of a report charging fraud made to the court under s. 8 (2) of the Companies (Winding-up) Act, 1890 (53 & 54 Vict. c. 63), was dismissed as frivolous and vexatious).

(*c*) Bankruptcy Act, 1883 (46 & 47 Vict. c. 52), s. 69 (3). See p. 72, *ante*.

(*d*) *Ibid.*, s. 69 (4). See note (*b*), p. 100, *ante*.

(*e*) Presumably after the receiving order; before that the court may appoint him interim receiver (Bankruptcy Act, 1883 (46 & 47 Vict. c. 52), s. 10 (1); and see Bankruptcy Rules, rr. 170—175, 177, 178, and p. 60, *ante*).

(*f*) Bankruptcy Act, 1883 (46 & 47 Vict. c. 52), s. 70 (1). See p. 76, *ante*. As interim receiver or manager the official receiver is in the same position as a receiver or manager appointed by the High Court, but as far as practicable he should consult the wishes of the creditors as to the management of the estate, calling meetings, if advisable, of persons claiming to be creditors. He should not, however, without permission from the Board of Trade incur expense beyond what is necessary for the protection of the estate or the disposal of perishable goods, or for the employment of some person or persons to assist in the preparation of the statement of affairs where the debtor is unable to prepare one properly (*ibid.*, s. 70 (2); Bankruptcy Rules, r. 326; see also r. 324, and p. 71, *ante*). His appointment as receiver, though not divesting the debtor of his property (*Rhodes* v. *Dawson* (1886), 16 Q. B. D. 548; *Re Berry*, [1896] 1 Ch. 939), operates as an injunction restraining the debtor from getting in money (*Re Sartoris*, [1892] 1 Ch. 11, 22). The official receiver, as interim receiver, ought not to realise, deal with or incumber the estate, except for the preservation and protection of the property (*Re Wells and Croft, Ex parte Official Receiver* (1894), 2 Mans. 41). He should not raise money to redeem property except by leave of the Board of Trade or the Court (*ibid.*).

As the debtor is not divested of his property by the receiving order, it works no change or transmission of interest or liability, so that the official receiver need not be added as a party to an action under R. S. C., Ord. 17, r. 4 (*Re Berry, supra*). Nor again does the receiving order make the official receiver owner or occupier for the purposes of s. 11 of the Gasworks Clauses Act, 1871 (34 & 35 Vict. c. 41) (*Re Smith, Ex parte Mason*, [1893] 1 Q. B. 323).

Whilst in possession of the estate he may make such subsistence allowance to the debtor for the support of himself and family as may be just, and in fixing it he takes into account the assistance given him by the debtor (Bankruptcy Rules, r. 325); see p. 76, *ante*.

(*g*) Bankruptcy Act, 1883 (46 & 47 Vict. c. 52), s. 70 (1) (b).

(*h*) *Ibid.*, s. 70 (1) (c), (d). See p. 69, *ante*. Where the official receiver who holds proxies cannot attend a meeting, he may by writing depute some person in his employment, or some officer of the Board of Trade, to attend and use the proxies as he may direct (Bankruptcy Rules, r. 327). Along with the notice of the first meeting a summary of the debtor's affairs is to be sent (Bankruptcy Act, 1883 (46 & 47 Vict. c. 52), Sched. I. (3)). At any time the official receiver may summon a meeting (at the expense of the estate) to enable the creditors to consider any act of the trustee, or any resolution of the committee of inspection, which the Board of Trade thinks should be brought before them (Bankruptcy Rules, r. 319).

(*i*) Bankruptcy Act, 1883 (46 & 47 Vict. c. 52), s. 70 (1) (e).

SUB-SECT. 2. Duties and Powers.

prescribed by the Acts or which may be necessary (*j*); to act as trustee where the office of trustee is vacant (*k*).

Power to administer oaths.

For the purpose of affidavits verifying proofs, petitions, or other proceedings under the Acts, an official receiver may administer oaths (*l*).

All such information, access to and facilities for inspecting the bankrupt's books and documents, and, generally, such aid as may be necessary for enabling the official receiver to perform his duties under the Acts, must be given by the trustee to the official receiver (*m*).

SUB-SECT. 3.—*As Trustee of Bankrupt's Property.*

Where official receiver trustee.

169. Immediately upon the adjudication of bankruptcy the official receiver becomes trustee of the bankrupt's property, which thereupon vests in him, and remains so vested until a creditors' trustee (if any) is appointed, in which case the property forthwith passes to and vests in such trustee (*n*).

The official receiver is trustee during any vacancy in the office of trustee (*o*) and also becomes trustee when the creditors' trustee is released (*p*).

In small bankruptcies (*q*), and in the administration of the estates of deceased insolvents (*r*), the official receiver is statutory trustee, but the creditors may in each case appoint a trustee of their own.

The official receiver may not be trustee save in cases mentioned in the Acts (*s*).

Provisions applicable to official receiver as trustee.

All expressions (*t*) referring to a trustee in bankruptcy include the official receiver when acting as trustee, unless the context requires or the Acts provide otherwise (*u*). Thus the official receiver when trustee may sell the bankrupt's property before a creditors' trustee is appointed (*w*). He is not appointed trustee within the

(*j*) Bankruptcy Act, 1883 (46 & 47 Vict. c. 52), s. 70 (1) (f). They include the receiving order, date of first meeting and of public examination (*ibid.*).

(*k*) *Ibid.*, s. 70 (1) (g). See p. 108, *post.*

(*l*) *Ibid.*, s. 68 (2). He may also attest petitions (Bankruptcy Rules, r. 146). As to proofs, see p. 231, *post.*

(*m*) Bankruptcy Act, 1883 (46 & 47 Vict. c. 52), s. 68 (4). On the other hand, on the appointment of a trustee, the official receiver is to give him, on request, such information as to the bankrupt and his estate and affairs as may be necessary or conducive to the discharge of the trustee's duties (Bankruptcy Rules, r. 318 (3)).

(*n*) Bankruptcy Act, 1883 (46 & 47 Vict. c. 52), s. 54 (1), (2). As to the powers of the official receiver in respect of proofs, see p. 231, *post.*

(*o*) *Ibid.*, s. 70 (1) (g) and s. 87 (4).

(*p*) *Ibid.*, s. 87 (4). The release operates as a removal of the trustee.

(*q*) See *ibid.*, s. 121, by which the creditors may, by special resolution, appoint as trustee a person other than the official receiver, and p. 295, *post.*

(*r*) See *ibid.*, s. 125, and p. 95, *ante.* By the Bankruptcy Act, 1890 (53 & 54 Vict. c. 71), s. 21 (3), the creditors have the same powers as to the appointment of trustees and committees of inspection as if the estate of a bankrupt who is alive were being administered.

(*s*) Bankruptcy Act, 1883 (46 & 47 Vict. c. 52), s. 21 (5).

(*t*) *Semble*, whether in the Acts or Rules. See *ibid.*, s. 127.

(*u*) *Ibid.*, s. 68 (3).

(*w*) *Turquand* v. *Board of Trade* (1886), 11 App. Cas. 286, affirming *Ex parte Board of Trade, Re Parker* (1885), 15 Q. B. D. 196. The power to sell is given by the Bankruptcy Act, 1883 (46 & 47 Vict. c. 52), s. 56. Compare *Re Cohen*, [1905] 2 K. B. 704.

provisions of the Bankruptcy Acts as to trustees (*x*), but he becomes so automatically (*y*). SUB-SECT. 3. As Trustee of Bankrupt's Property.

The representation of the estate is continuous, so that leave will be given to serve a trustee when appointed with a notice of motion already served on the official receiver as trustee (*a*).

The official receiver when trustee must obtain the permission of the committee of inspection, and, if there is no committee, of the Board of Trade, to do certain acts in cases where a creditors' trustee must obtain such permission (*b*).

SUB-SECT. 4.—*Books and Accounts.*

170. The official receiver, till a trustee is appointed, must keep a record book and a cash book (*c*), and, on the requisition of any creditor, with the concurrence of one-sixth of the creditors (including the creditor requiring the statement), furnish a statement of the accounts up to the date of the requisition (*d*). A list of the creditors must also be furnished by him to any creditor demanding it (*e*). Books etc. to be kept.

He must, when chairman of a meeting, cause minutes to be kept, and subsequently send to the registrar a copy of the resolutions (*f*).

171. The official receiver must account as directed by the Board of Trade to the debtor, or, as the case may be, to the trustee, where a composition or scheme is sanctioned, and to the trustee where the debtor is adjudged bankrupt. If the account is not satisfactory, a report may be made to the Board by the debtor or trustee, who, if not satisfied with the decision of the Board thereon, may apply to the court (*g*). Official receiver's accounts.

172. At the official receiver's request the debtor must furnish him with trading and profit and loss accounts, and a cash and goods account for any specified period not exceeding two years prior to the date of the receiving order, or for a longer period if the court so Debtor's accounts.

(*x*) See Bankruptcy Act, 1883 (46 & 47 Vict. c. 52), ss. 21, 54.

(*y*) See *Re Cohen*, [1905] 2 K. B. 704. See also *Re Calcott and Elvin*, [1898] 2 Ch. 460.

(*a*) *Re Hallett & Co., Ex parte Blane* (1893), 10 Morr. 250.

(*b*) *E.g.*, to employ a solicitor (*Re Duncan, Ex parte Duncan*, [1892] 1 Q. B. 331, on appeal, *ibid.*, 879). See Bankruptcy Act, 1883 (46 & 47 Vict. c. 52), s. 57, and p. 122, *post*.

(*c*) Bankruptcy Rules, rr. 285, 286. See also p. 130, *post*. The official receiver must account to the Board of Trade and pay over money and deal with securities as directed (Bankruptcy Act, 1883 (46 & 47 Vict. c. 52), s. 70 (3)).

(*d*) Bankruptcy Act, 1890 (53 & 54 Vict. c. 71), s. 17. The expenses must be deposited with the official receiver by the creditor requiring the statement, but may be repaid out of the estate if the creditors or the court so direct (*ibid.*).

(*e*) *Ibid.*, s. 16. He may charge 3*d.* per folio and postage.

(*f*) Bankruptcy Act, 1883 (46 & 47 Vict. c. 52), Sched. I., rr. 7, 25; Bankruptcy Rules, r. 255.

(*g*) Bankruptcy Rules, r. 336. When a trustee is appointed, the official receiver transfers to the trustee the cash book of the estate, and his transactions, unless specially audited beforehand, are audited at the first audit of the trustee's account; see also *Ex parte Fox, Re Smith* (1886), 17 Q. B. D. 4, and Bankruptcy Act, 1883 (46 & 47 Vict. c. 52), s. 101. By that section, where the court makes an order that a person is entitled to money received by the official receiver or the Board of Trade, the Board of Trade is to direct that such money shall be paid to such person.

SUB-SECT. 4. Books and Accounts.

orders. On the report of the official receiver that the debtor has failed to furnish any of these accounts, the court is to act as it may think just (*h*).

On the application of the official receiver the Board of Trade may direct that the debtor's books and other documents may be sold, destroyed, or otherwise disposed of (*i*).

SUB-SECT. 5.—*Miscellaneous Powers and Duties.*

Letters of administration.

173. The official receiver may apply for letters of administration so as to reach property belonging to the estate, and in such case his bond will be sufficient without sureties (*k*).

Striking solicitor off rolls.

He may apply to strike off the rolls for misconduct a solicitor who has been adjudged bankrupt (*l*).

Functions of committee of inspection.

Where there is no committee of inspection, he may, as directed, exercise those functions of a committee which devolve on the Board of Trade (*m*).

Redirection of debtor's letters.

The court on his application may order the debtor's letters to be re-directed to him for a period not exceeding three months (*n*).

SUB-SECT. 6.—*Applications to the Court.*

Mode of application.

174. Applications to the court may be made by the official receiver personally and without notice or other formality, but the court may in any case order the application to be renewed in a formal manner, on such notice to any person likely to be affected by it as the court may direct (*o*). In cases where evidence must be given on an application by the official receiver for directions (*p*), or to adjudge a debtor a bankrupt, or for leave to disclaim a lease, or for an extension of time therefor, or for an order to

(*h*) Bankruptcy Rules, r. 338. Compare *Ex parte Moir, Re Moir* (1882), 21 Ch. D. 61, where the proceedings were under the Bankruptcy Act, 1869 (32 & 33 Vict. c 71). An order for accounts may be made by the court, though the debtor asserts that the business to which they relate is not his, but the debtor may raise the point if a motion to commit him for disobedience to the order is made (*Re Cronmire, Ex parte Cronmire* (1894), 1 Mans. 79). The debtor cannot be committed because the accounts appear to the official receiver (or trustee, who, *semble*, may also act on the rule) to be untrue (*Re Davis, Ex parte Turnpenny* (1892), 9 Morr. 278).

(*i*) Bankruptcy Rules, r. 294. The official receiver has access to these whilst they are in the hands of the trustee (Bankruptcy Act, 1883 (46 & 47 Vict. c. 52), s. 68 (4)).

(*k*) *In the Goods of Cope* (1890), 15 P. D. 107 ; *In the Goods of Renninson* (1894), 1 Mans. 475. See title EXECUTORS AND ADMINISTRATORS.

(*l*) *Re a Solicitor* (1890), 25 Q. B. D. 17. He may use against him answers given at the public examination (*ibid.*).

(*m*) Bankruptcy Rules, r. 337 ; but not when he himself is trustee (*Re Duncan, Ex parte Duncan*, [1892] 1 Q. B. 331, and on appeal, *ibid.*, 879).

(*n*) Bankruptcy Act, 1883 (46 & 47 Vict. c. 52), s. 26. A similar application may be made by the trustee (*ibid.*). See p. 118, *post.*

(*o*) Bankruptcy Rules, r. 332.

(*p*) In cases of doubt or difficulty, or where provision is not made by the Acts or Rules as to proceedings in court, the official receiver may apply for directions (*ibid.*, r. 334), but not, as a rule, with regard to the management of the estate, where no legal question is involved (*Re G. & A. Mahler, Ex parte Honygar* (1884),1 Morr. 272 ; *Re Parker and Parker, Ex parte Turquand* (1884), 1 Morr. 275).

prosecute or to commit a bankrupt, the official receiver's report, which need not be on affidavit, is received as *primâ facie* evidence (*q*).

SUB-SECT. 6. Applications to the Court.

Disobedience to directions.

175. On default by a trustee, debtor or other person in obeying an order or direction of the official receiver or of the Board of Trade, application may be made to the court, which may order compliance with the order or direction, and may also, if it thinks fit, make an immediate order for committal (*r*). Notice of the application to commit should be served personally (*s*), but leave for substituted service may be given in a proper case, application for such leave being made to the registrar (*t*).

SUB-SECT. 7.—*Costs.*

How far liable for costs.

176. The official receiver is not personally liable for costs when, being trustee, he is sued as representing the debtor's estate, or when made a party to any cause or matter on the application of another party, unless the court otherwise directs (*a*), nor is he liable for the costs of an appeal from his rejection of a proof (*b*). And generally, where proceedings are taken by action, motion or otherwise against him in respect of any act done or default made by him when acting, or in the *bonâ fide* belief that he is acting, in pursuance of the Acts, or in execution of the powers given by them, the costs, damages and expenses which he may have to pay, or may be

(*q*) Bankruptcy Rules, r. 333. Compare *Re Bottomley, Ex parte Bottomley* (1893), 10 Morr. 262.

(*r*) Bankruptcy Act, 1883 (46 & 47 Vict. c. 52), s. 102 (5). This is in addition to any other remedy for such default (*ibid.*). Generally, the order to comply with the order or direction is made first and served personally; if not obeyed a subsequent application for committal should be made (*Re Margetts, Ex parte Board of Trade* (1884), 1 Morr. 211); but the Court may, in the first instance, make an order to commit (*Re Nicholson, Ex parte Board of Trade* (1888), 5 Morr. 278; *Re Tatum, Ex parte Board of Trade* (1889), 6 Morr. 107, which see as to the distinction between an order to pay principal and an order to pay interest under the Bankruptcy Act, 1883 (46 & 47 Vict. c. 52), s. 74 (6)). An order may be made under the section against a trustee who has been removed from office (*Re Rogers, Ex parte Board of Trade* (1887), 4 Morr. 67; *Re Tatum, Ex parte Board of Trade, supra*); and against a trustee for not accounting under the Bankruptcy Act, 1883, s. 162, though it is not shown that since the commencement of the Act he has had in his hands unclaimed or undistributed funds or dividends (*Re Cornish, Ex parte Board of Trade*, [1896] 1 Q. B. 99). Where a trustee ordered by the Court to pay money into the Bankruptcy Estates Account becomes bankrupt, and there is no evidence that he has wilfully disobeyed the order, he will not be committed (*Re Calderwood, Ex parte Board of Trade* (1891), 8 Morr. 135). A trustee in bankruptcy cannot rely on the provisions of s. 8 of the Trustee Act, 1888 (51 & 52 Vict. c. 59), as to pleading the Statutes of Limitation (*Re Cornish, Ex parte Board of Trade, supra*). Where the money is paid for the trustee by a surety there is no longer a default by the trustee (*Re Tatum, Ex parte Harker* (1889), 6 Morr. 179).

Semble, an application to enforce an order made by a county court and modified by the High Court should be made to the county court (*Re Thomas, Ex parte Comptroller in Bankruptcy* (1886), 3 Morr. 49).

(*s*) *Re Pearce, Ex parte Board of Trade* (1884), 1 Morr. 111, 135.

(*t*) *Re Calderwood, Ex parte Board of Trade* (1890), 7 Morr. 251.

(*a*) Bankruptcy Rules, r. 108 (3). See also *Ex parte Cundy* (1890), 7 Morr. 253, where he was respondent to a successful appeal and the costs were allowed against the estate only. But see *contra, Re Mackenzie*, [1899] 2 Q. B. 566.

(*b*) Bankruptcy Rules, r. 231.

SUB-SECT. 7. Costs.

put to, are to be paid out of the debtor's estate, if he, immediately on the commencement of the proceedings, reports them to the Board of Trade and that Board determines that they shall be resisted or defended (*c*). If that is not done, he cannot look to the estate for costs or expenses without a special order of the court (*c*).

Where the official receiver himself takes proceedings against another person which fail, he may, like an ordinary litigant, be ordered to pay the costs (*d*), or the costs of both parties may be directed to be paid out of the estate, in such order as the court thinks fit (*e*).

Appeals.

177. In ordinary appeals from county courts or the High Court, where the official receiver is not trustee and is not personally concerned, he ought not, as a rule, to appear, though served with notice, unless there is something special for him to bring to the notice of the court, in which case his costs will be allowed (*f*).

Where no available assets.

178. If a debtor has no available assets, the official receiver need not incur any expense in relation to the estate without express directions from the Board of Trade (*g*). Where the proceeds of the estate are not sufficient to cover the costs necessarily incurred by the official receiver (in excess of the deposit by the petitioning creditor) between the making of the receiving order and the conclusion of the first meeting, the petitioning creditor may be ordered to pay such costs (*h*).

Costs a first charge on assets.

179. Where there is an estate, the assets remaining, after payment of the expenses of realising them, are, subject to any order

(*c*) Bankruptcy Rules, r. 339; *Re Wells and Croft, Ex parte Official Receiver* (1894), 2 Mans. 41, where the official receiver was allowed the costs of a third party notice served on him and his own costs in an action by the trustee in bankruptcy; reported as *Feast* v. *Robinson* (1894), 63 L. J. (CH.) 321. Where proceedings are taken against him in a bankruptcy court, an adjournment will be granted pending the decision of the Board of Trade as to whether the proceedings should be resisted or defended (Bankruptcy Rules, r. 339 (4)). If the proceedings are commenced before a trustee is appointed, or a composition or scheme approved, the official receiver, before putting the trustee, or the debtor in case of a composition, into possession of the estate, may retain the whole or part of it, as the Board of Trade directs. Where the proceedings are commenced after the trustee's appointment or after the approval of a composition or scheme, the official receiver gives notice of them to the person in whom the estate is vested, and upon such notice the estate becomes charged with the payment of the damages, costs and expenses (*ibid.*, r. 339 (5)).

(*d*) *Re Glanville, Ex parte the Trustee* (1885), 2 Morr. 71.

(*e*) *Re W. H. Wilkinson, Ex parte Official Receiver* (1884), 1 Morr. 65. The official receiver may appeal against an order that he shall personally pay costs (*Re Raynes Park Golf Club, Ltd., Ex parte Official Receiver*, [1899] 1 Q. B. 961). See also *Ex parte Leicestershire Banking Co., Re Dale* (1884), 14 Q. B. D. 48, where an order, obtained on the motion of the official receiver, being reversed on appeal, the costs of both parties were ordered to be paid out of the estate, those of the appellant coming first; *Re Hounslow Brewery Co.*, [1896] W. N. 45.

(*f*) *Ex parte Dixon, Re Dixon* (1884), 13 Q. B. D. 118; *Re Webber, Ex parte Webber* (1890), 24 Q. B. D. 313 (appeal from receiving order); *Ex parte White, Re White* (1885), 14 Q. B. D. 600 (appeal from conditional order of discharge); *Ex parte Reed and Bowen, Re Reed and Bowen* (1886), 17 Q. B. D. 244 (rejection of scheme).

(*g*) Bankruptcy Rules, r. 335.

(*h*) *Ibid.*, r. 183 (2).

SUB-SECT. 7. Costs.

of the court, liable in the first place to the actual expenses of the official receiver in protecting the property and the expenses or outlay incurred by him or by his authority in carrying on the debtor's business (*i*).

When the debtor is adjudged bankrupt, the official receiver puts the trustee into possession of the estate, but the trustee must first discharge any balance due to the official receiver for fees, costs, charges and advances properly made, with interest on such advances at 4 per cent. per annum, and discharge, or undertake to discharge, all guarantees properly given by the official receiver for the benefit of the estate. Any such fees, costs or charges not discharged by the trustee before taking possession must be paid by him, and the official receiver has a lien on the estate till they are paid, and till the guarantees and other liabilities are discharged (*k*).

Taxation.

180. Where the bill of any person employed by the official receiver is to be taxed, a certificate signed by the official receiver must be produced stating the terms (if any) agreed on, and, in the case of a solicitor, the resolution sanctioning his employment (*l*).

Sheriff's bill.

If a sheriff who has to deliver goods to the official receiver after execution (*m*) does not bring in his bill for taxation within a month, the official receiver or trustee, as the case may be, may decline to pay it (*n*); and a sheriff, if required by the official receiver or trustee, must within seven days bring in for taxation the costs retained by him on delivery of the proceeds of a sale (*o*), and must pay to the official receiver or trustee any amount disallowed (*p*).

Procedure.

A person whose bill is to be taxed must give seven days' notice to the official receiver or trustee (if any), and the bill, three clear days before the appointment to tax, must be lodged with the official receiver or the trustee where items were incurred after his appointment, who lodges it with the taxing officer (*q*). The official receiver, as well as the trustee, may also get from the person whose bill it is a copy of it at the expense of the estate (*r*).

The official receiver may call the trustee's attention to items which he thinks should be disallowed or reduced. In strictness, he has no right to be present at the taxation of the bill of a solicitor or other person employed by the trustee, but the court may permit him, as an officer of the court and of the Board of Trade, to be present, to assist the taxing master by his advice, or to inform the trustee

(*i*) Bankruptcy Rules, r. 125.

(*k*) *Ibid*, r. 318.

(*l*) *Ibid.*, r. 117, which is applicable also, *mutatis mutandis*, where the employment is by the trustee. The solicitor employed by the official receiver cannot be allowed costs beyond the amount limited by the Board of Trade in sanctioning the employment (*Re Duncan, Ex parte Official Receiver*, [1892] 1 Q. B. 879).

(*m*) Under Bankruptcy Act, 1890 (53 & 54 Vict. c. 71), s. 11 (1); see p. 271, *post*.

(*n*) Bankruptcy Rules, rr. 118, 119 A.

(*o*) Pursuant to the Bankruptcy Act, 1890 (53 & 54 Vict. c. 71), s. 11 (2). See also p. 274, *post*.

(*p*) Bankruptcy Rules, rr. 119, 119 A.

(*q*) *Ibid.*, rr. 120, 121.

(*r*) At fourpence per folio (*ibid.*, r. 122).

SUB-SECT. 7. Costs.

what items should, in his opinion, be objected to, or for the purpose of advising the Board of Trade as to what took place (*s*).

SECT. 9.—*Trustees.*

SUB-SECT. 1.—*Who may be.*

Two classes of trustees.

181. It has been pointed out that the result of an adjudication of bankruptcy against a debtor is that all his property with certain statutory exceptions becomes by law vested in a trustee for distribution amongst his creditors (*t*). The persons who thus become trustees of a bankrupt's property are of two classes, firstly, official receivers, in the cases in which by virtue of their office they become trustees of the property of bankrupts of whose estates they are official receivers, and secondly, the official persons chosen by the creditors at meetings and certified by the Board of Trade.

Trustee appointed by creditors.

182. Any fit person or persons not under any legal incapacity, other than an official receiver, whether a creditor or creditors or not, may be appointed to fill the office of trustee of the property of the bankrupt (*u*).

Official receiver.

The official receiver cannot be chosen trustee of the property of the bankrupt by the creditors; but if the creditors or Board of Trade do not choose a trustee, the official receiver becomes and remains trustee (*w*). There are also certain cases in which the official receiver is statutory trustee (*a*).

SUB-SECT. 2.—*Appointment, Release and Removal.*

Appointment by creditors.

183. The creditors of a person who has been adjudged bankrupt, or whom they have resolved shall be adjudged bankrupt, may appoint a trustee or trustees of the bankrupt's property by ordinary resolution, or they may leave his appointment to the committee of inspection (*b*). They may appoint more persons than one to the office of trustee, but all such persons are included under the term "trustee" (*c*); and they may appoint trustees to act in succession in the event of one or more of the persons first named declining to

(*s*) Bankruptcy Rules, r. 122; *Re Nash & Sons, Ex parte Crofton, Craven, and Worthington*, [1896] 1 Q. B. 13.

(*t*) See p. 87, *ante*.

(*u*) Bankruptcy Act, 1883 (46 & 47 Vict. c. 52), ss. 21 (1), 84.

(*w*) *Ibid.*, s. 54 (1); Bankruptcy Act, 1890 (53 & 54 Vict. c. 71), s. 21 (3). The official receiver is trustee during a vacancy in the office of trustee, and after a trustee has been released. The official receiver, however, is the trustee in small bankruptcies, unless the creditors by special resolution appoint a trustee (Bankruptcy Act, 1883 (46 & 47 Vict. c. 52), s. 121 (i)).

(*a*) As to these, see p. 102, *ante*.

(*b*) Bankruptcy Act, 1883 (46 & 47 Vict. c. 52), s. 21 (1). An ordinary resolution is one decided by a majority in value of creditors present personally or by proxy at a meeting, and voting on the resolution (*ibid.*, s. 168). As to voting for such resolution, see *ibid.*, Sched. I. Any person holding a special proxy to vote for the appointment of himself as trustee may vote accordingly (*ibid.*, Sched. I., r. 26; Bankruptcy Act, 1890 (53 & 54 Vict. c. 71), s. 22 (3)).

(*c*) Bankruptcy Act, 1883 (46 & 47 Vict. c. 52), s. 84 (1).

accept the office, or failing to give security, or not being approved by the Board of Trade (*d*).

In bankruptcies of small estates summarily administered (*e*) the creditors may at any time by special resolution resolve that some person other than the official receiver shall be trustee (*f*).

Default of appointment.

184. If a trustee is not appointed by the creditors within four weeks from the date of adjudication, or, in the event of negotiations for a composition or scheme being pending at the expiration of those four weeks, then within seven days from the close of those negotiations by the refusal of the creditors to accept, or of the court to approve, the composition or scheme, the official receiver must report the matter to the Board of Trade, and thereupon the Board of Trade must appoint a trustee (*g*); but the creditors, or the committee of inspection if so authorised by resolution of the creditors, may at any subsequent time appoint a trustee who takes the place of the person appointed by the Board of Trade (*h*).

Where the debtor is adjudged bankrupt after the first meeting of creditors has been held and a trustee has not been appointed prior to the adjudication, the official receiver must summon a meeting for the purpose of appointing a trustee (*i*).

Trustees of bankrupt partners.

185. In the case of the members of a partnership being adjudicated bankrupts the trustee appointed by the joint creditors or the Board of Trade becomes the trustee of the separate estates. When one member of a partnership has become bankrupt and proceedings in bankruptcy are taken against another member of the same partnership, the trustee of the property of the first mentioned member becomes trustee of the property of the latter member, unless the court in which the first bankruptcy is proceeding otherwise directs (*j*).

Approval by Board of Trade.

186. The person who is appointed trustee must give security to the Board of Trade (*k*); and the Board of Trade, if satisfied, certifies

(*d*) Bankruptcy Act, 1883 (46 & 47 Vict. c. 52), s. 84 (2).

(*e*) See p. 295, *post*.

(*f*) Bankruptcy Act, 1883 (46 & 47 Vict. c. 52), s. 121, proviso. A special resolution is a resolution decided by a majority in number and three-fourths in value of creditors present personally or by proxy at a meeting, and voting on the resolution (*ibid.*, s. 168). But the words "at any time" in the proviso refer to a time prior to the release of the official receiver as trustee under s. 84 (*Re Leach, Ex parte Barnes*, [1900] 2 Q. B. 649, 651).

(*g*) Bankruptcy Act, 1883 (46 & 47 Vict. c. 52), s. 21 (6). An appointment by the Board of Trade of a trustee has very rarely been made, as it is naturally difficult to get a person to accept appointment unless the creditors have chosen him.

(*h*) Bankruptcy Act, 1883 (46 & 47 Vict. c. 52), s. 21 (7).

(*i*) *Ibid.*, s. 21 (8).

(*j*) *Ibid.*, s. 112. This is a curious instance in the Act of the creditors of the second partner being deprived of their right of choice.

(*k*) At present the security must be given for an amount fixed by the Board of Trade on the report of the official receiver, and must be given by a bond of an approved guarantee society (Bankruptcy Rules, r. 342). The leave of the Board of Trade is necessary where a trustee so appointed wishes to indemnify an agent against selling goods seized for rent due to the bankrupt's estate (*Board of Trade* v. *Provident Clerks' and General Guarantee Association, Ltd.* (1895), 72 L. T. 562).

SUB-SECT. 2. Appointment, Release and Removal.

his appointment (*l*), and such certificate is conclusive evidence of the appointment (*m*).

Grounds of objection by Board of Trade.

The Board of Trade may object to the appointment on the following grounds: that the person appointed has not been elected in good faith by a majority in value of the creditors voting; that he is not fit to act as trustee; that his connection with or relation to the bankrupt or his estate or to any particular creditor makes it difficult for him to act impartially in the interests of the creditors generally (*n*); that he has not complied with the requirements of s. 162 of the Bankruptcy Act, 1883 (*o*); or that in any other proceeding under the Act he has either been removed from the office of trustee for misconduct or neglect of duty, or has failed or neglected without good cause shown by him to render his accounts for audit for two months after the date by which the same should have been rendered (*p*).

Notification of objections to High Court.

When the Board of Trade makes such an objection, the Board must, if so requested by a majority in value of the creditors, notify the objection to the High Court, and that court then decides on the validity of the objection (*q*). The court only decides whether a valid ground of objection exists. If such a ground does exist the court does not interfere with the discretion which the Board of Trade has exercised (*r*). The Board of Trade may appeal to the Court of Appeal from a decision of the court disallowing an objection by the Board (*s*).

If the proposed person is or may be an accounting party to the estate by reason of his having dealt with the estate under a deed of assignment which is an act of bankruptcy, and to which the title of the trustee will relate back, he may, and in general will, be objected to by the Board of Trade (*a*). So also, if the proposed trustee is both creditor and trustee of another estate, with interests in the same property which conflict with those of the estate for which he is proposed, he may be objected to (*b*). But an objection that the trustee is nominated by the debtor's family or friends will not be upheld (*c*).

Certificate of appointment.

187. The appointment of the trustee takes effect as from the date of the certificate (*d*), which certificate, for all purposes of any law in force in any of the British dominions requiring

(*l*) Bankruptcy Act, 1883 (46 & 47 Vict. c. 52), s. 21 (2). For the form of certificate, see Bankruptcy Rules, Appendix, Forms, No. 115.

(*m*) Bankruptcy Act, 1883 (46 & 47 Vict. c. 52), s. 138.

(*n*) Bankruptcy Act, 1883 (46 & 47 Vict. c. 52), s. 21 (2).

(*o*) Bankruptcy Rules, r. 300. For the requirements of s. 162 (as to unclaimed and undistributed dividends or funds), see p. 240, *post*.

(*p*) *Ibid.*, r. 301.

(*q*) Bankruptcy Act, 1883 (46 & 47 Vict. c. 52), s. 21 (3). See also Bankruptcy Rules, r. 299 (1), as to procedure on such objection.

(*r*) *Re Mardon*, [1896] 1 Q. B. 140.

(*s*) *Re Lamb, Ex parte Board of Trade*, [1894] 2 Q. B. 805.

(*a*) *Re Martin* (1888), 21 Q. B. D. 29; *Re Stovold, Ex parte Board of Trade* (1889), 6 Morr. 7; *Re Mardon*, *supra*.

(*b*) *Re Lamb, Ex parte Board of Trade*, *supra*.

(*c*) *Re George Games, Ex parte Board of Trade* (1884), 1 Morr. 216.

(*d*) Bankruptcy Act, 1883 (46 & 47 Vict. c. 52), s. 21 (4).

SUB-SECT. 2. Appointment, Release and Removal.

registration or enrolment or recording of conveyances or assignments of property, is deemed to be a conveyance or assignment of property, and may be registered, enrolled, or recorded accordingly (*e*).

Notice of appointment.

The notice of the appointment must be gazetted by the Board of Trade, and a certificate of appointment must be sent by the Board of Trade to the registrar. Notice of the appointment must be inserted by the trustee in a local paper, the costs of the insertion being borne in the first instance by the trustee, who may charge them against the estate (*f*).

Filling of vacancy.

188. In the event of a vacancy occurring in the office of trustee, the creditors in general meeting may appoint a person to fill the vacancy (*g*); and the official receiver must on the requisition of any creditor summon a meeting for that purpose (*h*). If the creditors do not within three weeks of the occurrence of a vacancy appoint a person to fill it, the official receiver reports the matter to the Board of Trade, and the Board may appoint a trustee. The creditors, however, or the committee of inspection (as the case may be) have power to appoint another person as trustee who takes the place of the one appointed by the Board of Trade (*i*).

Until a trustee is appointed, or during any vacancy in the office of trustee, the official receiver acts as trustee (*k*).

Resignation.

If a trustee wishes to resign his office, he must call a meeting of the creditors to consider his resignation, and he must give the official receiver seven days' notice that such meeting is being called (*l*). He is then subject to the same rules as affect the question of his release (*m*).

Office vacated by insolvency.

If a receiving order is made against a trustee, he thereby vacates his office (*n*).

Removal of trustee by creditors.

189. A trustee in bankruptcy appointed by the creditors may be removed by them by ordinary resolution at a meeting specially called for the purpose of which seven days' notice has been given (*o*).

Voting powers of trustee.

The vote of the trustee or his partner, clerk, solicitor, or solicitor's clerk either as creditor or as proxy for a creditor must not be

(*e*) Bankruptcy Act, 1883 (46 & 47 Vict. c. 52), s. 54 (4). In Yorkshire the trustee must register his certificate to protect his title to land there (Yorkshire Registries Act, 1884 (47 & 48 Vict. c. 54), s. 14). See also Land Transfer Rules, 1903, rr. 193—199; *Re Calcott and Elvin*, [1898] 2 Ch. 460; and generally, as to registration, title REAL PROPERTY AND CHATTELS REAL.

(*f*) Bankruptcy Rules, r. 298.

(*g*) Bankruptcy Act, 1883 (46 & 47 Vict. c. 52), s. 87 (1).

(*h*) *Ibid.*, s. 87 (2).

(*i*) *Ibid.*, s. 87 (3).

(*k*) *Ibid.*, ss. 54 (1), 70 (1) (g), 87 (4).

(*l*) Bankruptcy Rules, r. 304.

(*m*) See pp. 112, 113, *post*.

(*n*) Bankruptcy Act, 1883 (46 & 47 Vict. c. 52), s. 85; *Re Newman, Ex parte Official Receiver*, [1899] 2 Q. B. 587. If the receiving order is rescinded the trustee is restored to his original position subject to any new rights which may have arisen in the interval.

(*o*) Bankruptcy Act, 1883 (46 & 47 Vict. c. 52), s. 86 (1). As to the summoning of such meeting, see p. 66, *ante*.

SUB-SECT. 2. Appointment, Release and Removal.

reckoned in the majority required for passing any resolution affecting the conduct of the trustee (*p*).

Removal by Board of Trade.

190. A trustee in bankruptcy appointed by the creditors may be removed by the Board of Trade, if the Board are of opinion that he is guilty of misconduct or fails to perform his duties under the Act; but if the creditors by ordinary resolution disapprove of the removal, they or the trustee may appeal to the High Court (*q*).

The Board of Trade may also remove a trustee in any case where the Board are of opinion that he is incapable of performing his duties either by reason of lunacy, continued sickness, or absence, or that his connection with or relation to the bankrupt or his estate or to any particular creditor may make it difficult for him to act impartially in the interests of the creditors generally; or where in any other matter he has been removed from office on the ground of misconduct (*r*); or where he has given security, but failed to keep it up (*s*); or in cases where he has without adequate explanation retained for more than ten days a sum exceeding £50 or such other amount as the Board of Trade in any particular case authorises him to retain; and on such moneys so retained the trustee shall pay interest at the rate of 20 per cent. per annum (*t*).

Where two or more trustees have been appointed there is power to remove one without removing all (*u*).

Notice of removal.

Where a trustee has been removed by the Board of Trade notice of the order of removing him must be sent at once to the registrar of the court by the Board of Trade; the registrar then gives written notice of the order to the official receiver, and files the notice with the proceedings in the bankruptcy. The Board of Trade also causes the notice to be gazetted (*a*).

Release.

191. As soon as the trustee has realised all the property of the bankrupt which can in his opinion be realised without needlessly protracting the trusteeship, and has distributed a final dividend, if any, or has otherwise ceased to act, or immediately after he has resigned or been removed, he may apply to the Board of Trade for his release (*b*).

Application for release.

Notice of his intention so to apply must be sent by him to the creditors who have proved in the bankruptcy, and to the debtor, together with a summary of his receipts and payments (*c*). On receipt of the application of the trustee for his release the Board of Trade must cause a report on his accounts to be drawn up, and as

(*p*) Bankruptcy Act, 1883 (46 & 47 Vict. c. 52), s. 88.

(*q*) *Ibid.*, s. 86 (2). As to a mere irregularity not amounting to misconduct, see *Re Morgan, Isted and Morgan, Ex parte Wilding* (1895), 2 Mans. 526.

(*r*) Bankruptcy Act, 1890 (53 & 54 Vict. c. 71), s. 19.

(*s*) Bankruptcy Rules, r. 302.

(*t*) Bankruptcy Act, 1883 (46 & 47 Vict. c. 52), s. 74 (6).

(*u*) *Re Mansel, Ex parte Newitt* (1884), 14 Q. B. D. 177, decided under the Bankruptcy Act, 1869 (32 & 33 Vict. c. 71), s. 83; Bankruptcy Act, 1883 (46 & 47 Vict. c. 52), ss. 84, 86.

(*a*) Bankruptcy Rules, r. 303.

(*b*) Bankruptcy Act, 1883 (46 & 47 Vict. c. 52), s. 82 (1).

(*c*) Bankruptcy Rules, r. 309. Where a composition or scheme has been adopted, such notice and summary is sent to the debtor only.

soon as he has complied with all the requirements of the Board the Board of Trade takes the report into consideration, and also any objections urged against his release by creditors or other persons interested, and grants or withholds the release accordingly, subject to his right of appeal to the High Court (*d*). SUB-SECT. 2. Appointment, Release and Removal.

Upon a trustee resigning or being released or being removed from his office, he must hand over all papers, books, accounts, and documents which have come into his possession as such trustee to the official receiver or the new trustee, as the case may be (*e*); and the order of release if granted does not take effect until he has done so (*f*). Delivery up of documents etc.

An order of the Board of Trade releasing the trustee discharges him from all liability in respect of any act done or default made by him in the administration of the bankrupt's estate or otherwise in relation to his conduct as trustee; but such order may be revoked on proof that it was obtained by fraud or by suppression or concealment of any material fact (*g*). The suppression or concealment must contain an element of fraud in order to justify the revocation (*h*). Effect of release.

Where the order of release is withheld by the Board of Trade the court on the application of any creditor or person interested may make such order as the court thinks just, charging the trustee with the consequences of any act or default that he may have done or made contrary to his duty, and he is liable for any such act or default (*i*). Release withheld.

A notice of the order granting the release of a trustee is gazetted by the Board of Trade, the requisite stamp fee for which must be provided by the trustee, who may charge the amount to the estate (*k*). Where the trustee has not resigned or been removed, the order of release operates as a removal of him from the office of trustee, and thereupon the official receiver becomes the trustee (*l*). Notice of release.

SUB-SECT. 3.—*Committee of Inspection.*

192. For the purpose of superintending the administration of a bankrupt's property by the trustee, a committee of inspection, which must consist of not more than five nor less than three persons, may be appointed by a resolution of the creditors qualified to vote from among the creditors, or from the holders of general proxies or general powers of attorney from such creditors (*m*); but no creditor who is so appointed is qualified to act until he has proved his debt and the proof has been admitted (*n*). Whenever the number of the committee is less than five the creditors may increase Appointment of committee.

(*d*) Bankruptcy Act, 1883 (46 & 47 Vict. c. 52), s. 82 (1).
(*e*) Bankruptcy Rules, r. 292.
(*f*) *Ibid.*, r. 310 A.
(*g*) Bankruptcy Act, 1883 (46 & 47 Vict. c. 52), s. 82 (3).
(*h*) *Re Harris, Ex parte Hasluck*, [1899] 2 Q. B. 97.
(*i*) Bankruptcy Act, 1883 (46 & 47 Vict. c. 52), s. 82 (2).
(*k*) Bankruptcy Rules, r. 310.
(*l*) Bankruptcy Act, 1883 (46 & 47 Vict. c. 52), s. 82 (4). Under this subsection there is no power in the creditors to appoint a new trustee (*Re Leach, Ex parte Barnes*, [1900] 2 Q. B. 649).
(*m*) Bankruptcy Act, 1883 (46 & 47 Vict. c. 52), s. 22 (1). As to qualification to vote, see p. 67, *ante*.
(*n*) Bankruptcy Act, 1890 (53 & 54 Vict. c. 71), s. 5.

SUB-SECT. 3. Committee of Inspection.

the number up to five (*o*). In the administration by the bankruptcy court of the estate of a deceased insolvent (*p*) the creditors have exactly the same powers to appoint a trustee and committee of inspection as in an ordinary bankruptcy (*q*).

Partners.

Where the members of a partnership have been adjudicated bankrupt, each set of separate creditors may appoint a separate committee. If, however, any set of separate creditors do not appoint a separate committee, the committee appointed by the joint creditors is considered to have been appointed by each set of separate creditors (*r*).

Small bankruptcies.

In small bankruptcies there is no committee, and the Board of Trade gives any permission which a committee would give (*s*).

Where no committee appointed.

193. If there is no committee, any act or thing or any direction or permission authorised or required to be done or given by a committee may be done or given by the Board of Trade (*a*). The sanction or permission of the Board of Trade is given by a document issued by that department, which document is receivable as evidence of the sanction or permission and its terms (*b*).

Defect in appointment.

194. No defect or irregularity in the appointment of a member of a committee of inspection will vitiate any act done by him in good faith (*c*).

Expenses.

The members are entitled to their actual out-of-pocket expenses necessarily incurred subject to the approval of the Board of Trade, and such expenses are a charge upon the assets realised (*d*).

Functions of committee.

195. The committee of inspection is appointed for the purpose of superintending the administration of the bankrupt's estate by the trustee (*e*). Where no trustee has been appointed, or a vacancy has occurred, the committee may appoint a trustee, if authorised to do so by the creditors (*f*); with the like authority, the committee may fix his remuneration (*g*), and when it has once resolved on what

(*o*) Bankruptcy Act, 1883 (46 & 47 Vict. c. 52), s. 22 (8).

(*p*) Under s. 125, *ibid.*

(*q*) Bankruptcy Act, 1890 (53 & 54 Vict. c. 71), s. 21 (3), and see p. 96, *ante*.

(*r*) Bankruptcy Rules, r. 268.

(*s*) Bankruptcy Act, 1883 (46 & 47 Vict. c. 52), s. 121 (2), and see p. 295, *post*.

(*a*) *Ibid.*, s. 22 (9); Bankruptcy Rules, r. 337; *Re Duncan, Ex parte Official Receiver*, [1892] 1 Q. B. 879.

(*b*) Bankruptcy Act, 1883 (46 & 47 Vict. c. 52), s. 140 (1), (2); *Re Johnstone, Ex parte Singleton* (1885), 2 Morr. 206; *Re Duncan, Ex parte Duncan* (1891), 8 Morr. 297. Where the permission of the Board of Trade is required to authorise the trustee to do any act, and such permission is not produced at the hearing of the matter under discussion, the President of the Board of Trade may give a certificate in a special form ratifying the permission given, which is conclusive evidence of the authority so certified, and which is retrospective. For the form of certificate, see *Re Johnstone, Ex parte Singleton, supra*, at p. 211.

(*c*) Bankruptcy Act, 1883 (46 & 47 Vict. c. 52), s. 143 (2).

(*d*) Bankruptcy Rules, r. 125.

(*e*) Bankruptcy Act, 1883 (46 & 47 Vict. c. 52), s. 22 (1).

(*f*) *Ibid.*, ss. 21 (7), 87 (3).

(*g*) *Ibid.*, s. 72 (1). See also Bankruptcy Act, 1890 (53 & 54 Vict. c. 71), s. 15 (1).

basis the remuneration shall be, it has no power without the leave of the court to rescind the resolution (*h*).

The directions of the committee must always be regarded by the trustee in the administration of the bankrupt's property, unless they are overridden by the creditors in general meeting or by an order of the court (*i*), or unless in his judgment they are frivolous and wasteful (*k*). Certain powers (*l*) in respect of the bankrupt's property are only exercisable with the permission of the committee of inspection; such permission cannot be given generally to exercise all or any of the powers, but must be obtained specially for each particular case (*m*).

Directions and permissions to trustee.

If the committee is of opinion that for any reason the trustee should have an account at a local bank, it may apply to the Board of Trade for that purpose, and the Board may authorise the trustee to open and operate on an account at any local bank selected by the committee (*n*). Both the application and the authority must be in the specified forms (*o*). All cheques on the account must be countersigned by at least one member of the committee of inspection, and by any other person whom the creditors or committee may appoint for the purpose (*p*).

Account at local bank.

Where the trustee is carrying on the bankrupt's business, the trading accounts must be verified by affidavit once a month, and must be submitted by the trustee to the committee, or to any member of it appointed for the purpose, to be examined and certified (*q*). The consent of the committee is required to the appointment of the bankrupt to superintend the management of his property, or to any allowance which the trustee may make to him either for his support, or in consideration of services rendered in winding up the estate (*r*).

Carrying on business.

In the case of co-debtors where costs have been properly incurred after the appointment of a trustee, and either the joint or separate estates are insufficient to pay them, no payment out of the separate in favour of the joint estate or *vice versâ* in respect of such costs may be made by the trustee without the consent of the committee of inspection of the estate from which the payment is to

Co-debtors.

(*h*) Compare *Re Marsden, Ex parte Board of Trade* (1892), 9 Morr. 70. The committee must apply to the Court to set the resolution aside. An appointment of a trustee by a committee of inspection is very rarely made.

(*i*) Bankruptcy Act, 1883 (46 & 47 Vict. c. 52), s. 89 (1); *Re Ridgway, Ex parte Hurlbatt* (1889), 6 Morr. 277; *Re A. & T. G. Ridgway, Ex parte Clarke* (1891), 8 Morr. 289.

(*k*) *Re Smith, Ex parte Brown* (1886), 3 Morr. 202. The trustee must use his own judgment, and act reasonably, or he may be made personally liable for the costs thrown away.

(*l*) These are enumerated in the Bankruptcy Act, 1883 (46 & 47 Vict. c. 52), s. 57. See also p. 122, *post*.

(*m*) *Ibid.*, s. 57; *Re Vavasour* (1900), 7 Mans. 262. The resolution must in some way specify the case or cases where permission is given, and may limit the amount of expense to be incurred.

(*n*) Bankruptcy Act, 1883 (46 & 47 Vict. c. 52), s. 74 (4).

(*o*) Bankruptcy Rules, r. 312, Appendix, Forms, Nos. 136, 137.

(*p*) *Ibid.*, r. 340.

(*q*) *Ibid.*, r. 308 (2).

(*r*) Bankruptcy Act, 1883 (46 & 47 Vict. c. 52), s. 64 (1), (2).

SUB-SECT. 3. Committee of Inspection.

be made, and in case of refusal by the committee the trustee may apply for an order of the court (*s*).

Meetings of committee.

196. The meetings of the committee must be held at such times as the members may appoint, but at least once a month, and the trustee or any member of the committee may call meetings whenever necessary (*t*). The committee may act by a majority of the members present at any meeting, provided that a majority of the members of the committee are present (*a*). Where one fourth in value of the creditors desire it any member of the committee may call a general meeting of the creditors to consider the propriety of removing the trustee upon deposit of a sum sufficient to cover the cost of summoning the meeting (*b*).

Review of committee's decision.

The official receiver has power at the instance of the Board of Trade to summon a general meeting of the creditors to review any decision of the committee of inspection (*c*), and if the creditors *bonâ fide* refuse to accept any decision or scheme sanctioned by the committee, the court will not interfere (*d*).

Resignation and removal of members.

197. If any member wishes to resign he must give written notice to the trustee (*e*), and he vacates his office by bankruptcy, compounding with his creditors, or absence from five consecutive meetings of the committee (*f*). A member may be removed by ordinary resolution of the creditors at any meeting summoned with seven days' notice to parties interested stating the object of the meeting (*g*). The continuing members may act notwithstanding vacancies, provided there are at least two of them (*h*). On a vacancy occurring it is the trustee's duty immediately to summon a meeting of creditors to elect some eligible persons to fill it (*i*).

Purchase of debtor's estate.

198. No member of a committee of inspection may purchase any part of the bankrupt's estate, either directly or indirectly or by his partner, clerk, servant, or agent, unless he has first obtained the sanction of the court, and such a purchase may be set aside if the sanction has not been obtained (*k*).

Profit or payment for services.

Nor may any member of a committee of inspection, his partner,

(*s*) Bankruptcy Rules, r. 128 (2).
(*t*) Bankruptcy Act, 1883 (46 & 47 Vict. c. 52), s. 22 (2).
(*a*) *Ibid.*, s. 22 (3).
(*b*) Bankruptcy Rules, r. 311.
(*c*) *Ibid.*, r. 319.
(*d*) *Re Ridgway, Ex parte Hurlbatt* (1889), 6 Morr. 277.
(*e*) Bankruptcy Act, 1883 (46 & 47 Vict. c. 52), s. 22 (4).
(*f*) *Ibid.*, s. 22 (5).
(*g*) *Ibid.*, s. 22 (6).
(*h*) *Ibid.*, s. 22 (8).
(*i*) *Ibid.*, s. 22 (7).
(*k*) Bankruptcy Rules, r. 316. Compare *Re Gallard, Ex parte Gallard*, [1897] 2 Q. B. 8. A partner of a member of a committee may purchase independently on his own account. A sale at an under-value to a member of the committee may be set aside notwithstanding that the period fixed by the Statute of Limitations has elapsed before application to set the sale aside is made; and the court, instead of setting aside the sale, may award damages (*Re Gallard, Ex parte Gallard, supra; Chaplin* v. *Young* (1864), 33 Beav. 414; *Re Gallard, Ex parte Gallard*, [1896] 1 Q. B. 68).

employer, agent, clerk, or servant, either directly or indirectly derive any profit from any transaction arising out of the bankruptcy, or receive any payment from the estate for services rendered or for goods supplied to the trustee for the estate (*l*). The sanction will only be given for special services, and on no account for any work done by a member of a committee as such member (*m*), and it must be obtained before the profit is derived, or the work undertaken (*n*), the costs of obtaining the sanction being in all cases borne by the person in whose interest it is obtained (*o*).

SUB-SECT. 3. Committee of Inspection.

SUB-SECT. 4.—*Powers and Duties of Trustee.*

199. It is the duty of the trustee in bankruptcy to take control of all the property of the bankrupt for the purpose of realisation and distribution amongst the creditors (*p*), and in general to obtain all information from the bankrupt about his affairs (*q*), and to assist the official receiver in his duties as far as he is able (*r*). He must immediately advertise his appointment in a local paper (*s*), and if the appointment is certified before the close of the bankrupt's public examination he may take part in it (*t*). As soon as possible he must take over all books, deeds, and documents, and all other property of the bankrupt capable of manual delivery (*a*), excepting documents which are the property of third parties and over which the bankrupt has no lien (*b*).

Control of bankrupt's property.

200. As against the trustee no one can set up a lien on the bankrupt's books of account (*c*). Where a lien can be set up on documents, the trustee is entitled to inspection (*d*); and where there

Lien on documents.

(*l*) Bankruptcy Rules, r. 317; and compare *Re Gallard, Ex parte Gallard*, [1896] 1 Q. B. 68.

(*m*) Bankruptcy Rules, r. 317 A.

(*n*) *Re Gallard, Ex parte Gallard, supra.*

(*o*) Bankruptcy Rules, r. 316 A (2).

(*p*) Bankruptcy Act, 1883 (46 & 47 Vict. c. 52), s. 20 (1). See s. 168 (1) as to the definition of property, and s. 54 (1), (2), as to the date when the property vests in him, and see also p. 87, *ante*. By s. 54 (3) the property passes without conveyance and assignment to the trustee, and remains vested in him while in office.

(*q*) *Ibid.*, s. 24 (2), (3); and see *Re Lawrence* (1870), 22 L. T. 246.

(*r*) Bankruptcy Act, 1883 (46 & 47 Vict. c. 52), s. 68 (4).

(*s*) Bankruptcy Rules, r. 298; and see p. 111, *ante*.

(*t*) Bankruptcy Act, 1883 (46 & 47 Vict. c. 52), s. 17 (6).

(*a*) *Ibid.*, s. 50 (1); and see Bankruptcy Rules, r. 292, as to delivery up of books to the official receiver or new trustee by the trustee on removal or release.

(*b*) See *Re Scott, Ex parte Scott* (1892), 9 Morr. 267, as to solicitor's papers. The trustee is not entitled to delivery of books in which other persons have a joint interest with the debtor, but such persons will be required to give the trustee reasonable facilities for inspecting the books (*Ex parte Baker*, [1904] 2 K. B. 68).

(*c*) Bankruptcy Rules, r. 349. See *Stevens* v. *Capital and Counties Bank* (1901), 17 T. L. R. 250. Books of account do not include cheque books and general documents (*Re Winslow, Ex parte the Trustee* (1886), 3 Morr. 60).

(*d*) *Re Toleman and England, Ex parte Bramble* (1880), 13 Ch. D. 885, where the debtor's solicitor claimed a lien on documents in his possession; and see also *Re Burnand, Ex parte Baker, Sutton & Co.*, [1904] 2 K. B. 68, where there were joint proprietors of an underwriting business, who claimed to withhold the books from the trustee. As to the position of a London agent solicitor claiming

SUB-SECT. 4. Powers and Duties of Trustee.

has been an assignment of book debts, carrying the books with it, the trustee is entitled to inspection, but not to delivery to him, of the books (*e*).

Redirection of letters.

On the trustee's application the court may order all letters addressed to the bankrupt at any place or places to be redirected to the trustee for a fixed period not exceeding three months (*f*).

Examination of debtor and others for discovery of property.

201. For the purpose of acquiring information about the bankrupt and his affairs or of inspecting any documents relating to his dealings or property the trustee may apply to the court to summon the bankrupt, his wife, or any person known or suspected to have any of his property, or to be indebted to his estate, or to be capable of giving information about his affairs, to appear before the court and produce any documents relating to the bankruptcy (*g*) and be examined on oath about such matters (*h*). And if such person admits his indebtedness or his possession of any of the bankrupt's property, the trustee has power to apply to the court that such person shall pay over to him the amount of his debt (*i*), or shall hand over to him such property of the bankrupt as may be in his possession or control (*k*). He may apply to the court for a subpœna for the attendance of any witness and the production of documents in his possession (*l*).

Acquisition and realisation.

202. For the purpose of acquiring and retaining possession of the bankrupt's property the trustee is in the same position as a receiver in the High Court, and for the purpose of realising it he has powers of transfer, conveyance, and sale subject to the nature of the property in question (*m*).

At the same time he may not purchase all or any of the property himself, either directly or indirectly, unless the court gives him leave (*n*), though he may sell to the bankrupt (*o*).

a lien on documents for agency charges against a country solicitor who is bankrupt, see *Re Jones and Roberts*, [1905] 2 Ch. 219.

(*e*) *Re West, Ex parte Good* (1882), 21 Ch. D. 868; *Re White & Co., Ex parte Official Receiver* (1884), 1 Morr. 77, at p. 81.

(*f*) Bankruptcy Act, 1883 (46 & 47 Vict. c. 52), s. 26.

(*g*) *Ibid.*, s. 27 (1); Bankruptcy Rules, r. 78. This rule applies to a trustee appointed under a scheme of arrangement (Bankruptcy Act, 1890 (53 & 54 Vict. c. 71), s. 3 (16)). See also *Re Franks, Ex parte Official Receiver* (1892), 9 Morr. 90, and *Re Franks, Ex parte Gittins*, [1892] 1 Q. B. 646, as to cases where persons to be examined are litigating with the trustee. With regard to discovery of property generally, see p. 140, *post*.

(*h*) Bankruptcy Act, 1883 (46 & 47 Vict. c. 52), s. 27 (3).

(*i*) *Ibid.*, s. 27 (4).

(*k*) *Ibid.*, s. 27 (5).

(*l*) Bankruptcy Rules, r. 61.

(*m*) See Bankruptcy Act, 1883 (46 & 47 Vict. c. 52), s. 50, and pp. 188 *et seq.*

(*n*) Bankruptcy Rules, r. 316. Compare *Nugent* v. *Nugent*, [1907] 2 Ch. 293. A trustee's partner may purchase, if he does it on his own account and independently (see *Re Gallard, Ex parte Gallard* (1897), 4 Mans. 52; but see *contrâ*, *Ex parte Moore, Re Moore* (1881), 45 L. T. 558, where under the Bankruptcy Act, 1869 (32 & 33 Vict. c. 71), a sale to a trustee's partner by public auction was set aside. See p. 120, *post*; and *Boswell* v. *Coaks* (1883), 52 L. J. (CH.) 465).

(*o*) See *Ex parte Tinker, Re France* (1874), 43 L. J. (BCY.) 147; *Kitson* v. *Hardwick* (1872), L. R. 7 C. P. 473; *Ex parte Wainwright, Re Wainwright* (1881), 19 Ch. D. 140.

SUB-SECT. 4. Powers and Duties of Trustee.

General discretion.

203. It is the trustee's duty to use his own discretion in the management and distribution of the estate (*p*), but he must have regard to any directions given by the committee of inspection or the creditors by resolution (*q*). In cases of complication or difficulty he may apply to the court for directions (*r*), but there is no obligation on the court to give him directions (*s*), and where he has obtained a decision he should not as a rule appeal from it (*t*). As an officer of the court he must act as is just and right, and the court will not allow him to take advantage of a mistake (*a*).

Powers exercisable without consent of committee.

(1) Sale generally.

204. Subject to the other provisions of the Bankruptcy Act, 1883, the trustee (*b*), without the consent of the committee of inspection, has power to deal with the bankrupt's property as follows :—

He may sell all or any part of it (including the goodwill of the business, if any, and the book debts due or growing due to the bankrupt) and may transfer the whole to any persons or company or may sell it in parcels (*c*). It is the duty of the trustee, subject to the power given him to divide property in specie among creditors (*d*), to realise the property of the bankrupt by sale with all reasonable speed (*e*). The trustee, except with the consent of the committee of inspection, can only sell for cash (*f*). The trustee

(*p*) Bankruptcy Act, 1883 (46 & 47 Vict. c. 52), s. 89 (4). See *Ex parte Lloyd, Re Peters* (1882), 47 L. T. 64.

(*q*) Bankruptcy Act, 1883 (46 & 47 Vict. c. 52), s. 89 (1); and see *Re Smith, Ex parte Brown* (1886), 3 Morr. 202. The trustee cannot shield himself behind the directions of the committee of inspection if, in his opinion, they are frivolous and wasteful (*Re Smith, Ex parte Brown, supra.* Directions at a general meeting of creditors override those of the committee (*Re Ridgway, Ex parte Hurlbatt* (1889), 6 Morr. 277; *Re A. and T. G. Ridgway, Ex parte Clarke* (1891), 8 Morr. 289; and *Re F. W. Oborne, Ex parte Marillier* (1896), 3 Mans. 238, where, owing to an informality, a minority of creditors had carried their resolutions).

(*r*) Bankruptcy Act, 1883 (46 & 47 Vict. c. 52), s. 89 (3); Bankruptcy Rules, r. 313.

(*s*) See *Re Pilling, Ex parte Salaman* (1906), 13 Mans. 229; *Re Harrison Ingram, Ex parte Whinney*, [1905] W. N. 143; *Re Webb & Sons, Ex parte Webb & Sons* (1887), 4 Morr. 52.

(*t*) If the appeal fails, the trustee may be made personally liable for costs incurred. His proper course is to obtain the consent of the creditors and a guarantee from them (*Re Malden, Gibson & Co., Ex parte James* (1886), 3 Morr. 185). See p. 135, *post.*

(*a*) See *Ex parte James, Re Condon* (1874), 9 Ch. App. 609; *Re Rivett-Carnac, Ex parte Simmonds* (1885), 55 L. J. (Q. B.) 74; *Re Tyler, Ex parte Official Receiver*, [1907] 1 K. B. 865. But see *Re Hall, Ex parte Official Receiver*, [1907] 1 K. B. 875, where the mistake arose through ignorance of the working of the bankruptcy laws; *Re Tricks, Ex parte Charles* (1885), 3 Morr. 15, where the trustee took advantage of a technicality.

(*b*) The official receiver, when acting as trustee, has these powers (*Turquand* v. *Board of Trade* (1886), 11 App. Cas. 286).

(*c*) Bankruptcy Act, 1883 (46 & 47 Vict. c. 52), s. 56 (1).

(*d*) See Bankruptcy Act, 1883 (46 & 47 Vict. c. 52), s. 57 (9).

(*e*) *Ex parte Goring* (1790), 1 Ves. 168; *Ex parte Miller* (1840), 1 Mont. D. & De G. 39; *Ex parte Hughes, Ex parte Lyon* (1802), 6 Ves. 617; *Ex parte Kendall* (1811), 17 Ves. 514; *Ex parte Montgomery* (1822), 1 Gl. & J. 338; *Re Atkinson* (1840), 1 Mont. D. & De G. 238), but he has to exercise his own discretion as to the time and mode of sale, and unless he does not exercise his discretion *bonâ fide*, the Court will not interfere (*Ex parte Lloyd, Re Peters* (1882), 47 L. T. 64).

(*f*) Bankruptcy Act, 1883 (46 & 47 Vict. c. 52), s. 57 (4).

SUB-SECT. 4. Powers and Duties of Trustee.

may sell a right of action (*g*). He may sell to the bankrupt himself (*h*).

Sale by trustee to himself.

Neither the trustee nor any member of the committee of inspection can while acting as trustee or member of such committee, except by leave of the court, by himself or any partner, clerk, agent, or servant, purchase any part of the estate (*i*). The leave of the court must be given before the sale (*k*), and the giving of leave divests the trustee of his fiduciary character as regards the subject-matter of the sale (*l*). A sale without leave to the solicitor of the trustee is liable to be set aside (*m*). A sale to a partner of the trustee or of a member of the committee of inspection will be good if the sale is *bonâ fide* and on the partner's own account, and not on account of or in the interest of his partner or the firm (*n*). A sale of a bankrupt's interest in partnership property to his solvent co-partners is valid and not impeachable (*o*).

Sale of real estate.

If the trustee contract to sell real estate without any stipulation as to title, he is bound, like other persons, to make a good title; and if he does not, he cannot obtain an order for specific performance against the person with whom he has contracted (*p*). He may by special stipulation contract to sell only such a title as the bankrupt had; and in such a case, if the bankrupt has any title at all, an order may be obtained by the trustee for the specific performance of the contract (*q*).

A trustee who sells the leaseholds of the bankrupt cannot require from the purchaser a covenant to indemnify the trustee against

(*g*) *Seear* v. *Lawson* (1880), 15 Ch. D. 426; *Guy* v. *Churchill* (1889), 40 Ch. D. 481.

(*h*) *Kitson* v. *Hardwick* (1872), L. R. 7 C. P. 473, 479; and see *Ex parte Tinker, Re France* (1874), 9 Ch. App. 716.

(*i*) Bankruptcy Rules, r. 316; *Ex parte Lacey* (1802), 6 Ves. 625; *Ex parte James* (1803), 8 Ves. 337; *Pooley* v. *Quilter* (1858), 2 De G. & J. 327; *Re Moore, Ex parte Moore* (1881), 51 L. J. (CH.) 72; *Ex parte Wainwright, Re Wainwright* (1881), 19 Ch. D. 140.

(*k*) *Re Gallard, Ex parte Gallard*, [1896] 1 Q. B. 68.

(*l*) *Boswell* v. *Coaks* (1883), 23 Ch. D. 302.

(*m*) *Ex parte James, supra.* So is a sale to the solicitor of the bankrupt, if the solicitor avails himself of the knowledge which he had gained as solicitor to the bankrupt, and is thus enabled to purchase at a low rate (*Luddy's Trustee* v. *Peard* (1886), 33 Ch. D. 500).

(*n*) *Re Gallard, Ex parte Gallard*, [1897] 2 Q. B. 8.

(*o*) *Re Motion* (1873), 9 Ch. App. 192. When a sale is liable to be set aside as fraudulent, instead of setting it aside, the court may direct an inquiry as to damages (*ibid.*). As to the effect of the lapse of time on a claim for relief in the case of such a transaction, see *Re Gallard, Ex parte Gallard* [1897] 2 Q. B. 8.

(*p*) *M'Donald* v. *Hanson* (1806), 12 Ves. 277.

(*q*) *Freme* v. *Wright* (1819), 4 Madd. 364, but see *Edwards* v. *Wickwar* (1865), L. R. 1 Eq. 69, at p. 70. As to a condition that the trustee should not be required to show any further title than the vesting of the bankrupt's estate in the trustee, see *Borell* v. *Dann* (1843), 2 Hare, 440, at pp. 443, 455. If the trustee retains the title-deeds or cannot deliver them to the purchaser (see Vendor and Purchaser Act, 1874 (37 & 38 Vict. c. 78), s. 2 (5), he must give attested copies at the expense of the estate, and, unless he stipulates to the contrary, must give an acknowledgment of the right of the purchaser to the production of the title-deeds, but such an acknowledgment will be limited to the time of his continuance as trustee (*Ex parte Stuart, Re Leicester* (1815), 2 Rose, 215). See also title SALE OF LAND.

breaches of the covenants of the lease, for the trustee is under no liability under the covenants when he has parted with the lease. A trustee would not be justified in stipulating for such an indemnity, as it would reduce the value of the lease which is sold (*r*).

Sale by auctioneer.

If any part of the bankrupt's property is sold by the trustee through an auctioneer or other agent, the gross proceeds of such sale must be paid over by the auctioneer or agent, and the charges connected with the sale are to be afterwards paid to the auctioneer or agent on the production of the necessary allocatur of the taxing officer. Every trustee by whom an auctioneer or agent is employed is accountable for the proceeds of the sale (*a*). The trustee who employs an auctioneer or agent should insist upon payment of the gross proceeds of sale into the Bankruptcy Estates Account, and if he does not do so, he will become personally liable, if there is any loss (*b*).

Book debts.

By "book debts" are meant all such debts accruing in the ordinary course of a man's trade as are usually entered in trade books, but to constitute a book debt it is not necessary that the debt should be entered in a book (*c*).

(2) Receipts.

He may give receipts for any money received by him, which receipts effectually discharge the persons paying the money from all responsibility in respect of its application (*d*).

(3) Proof of debt due to bankrupt.

He may prove, rank, claim and draw a dividend in respect of any debt due to the bankrupt (*e*).

(4) General powers.

He may exercise any powers the capacity to exercise which is vested in him under the Bankruptcy Act, 1883 (*f*), and may execute any power of attorney, deeds and other instruments for the purpose of carrying into effect the provisions of the Act (*g*).

(5) Entailed property.

He may deal with any property to which the bankrupt is beneficially entitled as tenant in tail in the same manner as the bankrupt might have dealt with it (*h*).

(*r*) *Wilkins* v. *Fry* (1816), 1 Mer. 244, at pp. 265, 268.

(*a*) Bankruptcy Rules, r. 295.

(*b*) *Board of Trade* v. *Provident Clerks and General Guarantee Association, Ltd.* (1895), 72 L. T. 562. The trustee cannot without the consent of the committee of inspection or the Board of Trade give to an agent or auctioneer an indemnity against the consequence of a sale of the bankrupt's goods (*ibid.*).

(*c*) *Shipley* v. *Marshall* (1863), 14 C. B. (N. S.) 566, where the bankrupt was a saddler, who had also been in the habit of buying and selling copyrights of newspapers. The bankrupt sold one of these copyrights, and money was owing to him in respect of such sale. The transaction did not appear in any of his ordinary trade books, but was entered in his diary. It was held that the money due was a book debt of the bankrupt. As to sale of goodwill, see p. 160, *post*.

(*d*) Bankruptcy Act, 1883 (46 & 47 Vict. c. 52), s. 56 (2).

(*e*) *Ibid.*, s. 56 (3). See *Ex parte Sir William Russell, Re Sir William Russell* (1875), 10 Ch. App. 255. The bankrupt must, it seems, join with the trustee in making the affidavit in support of the proof (*Ex parte Robson, Re Amner* (1841), 2 Mont. D. & De G. 65). A trustee applying to prove will not be affected by laches in the same way as an ordinary creditor (*Ex parte Smith* (1832), 1 Deac. & Ch. 267).

(*f*) See Bankruptcy Act, 1883 (46 & 47 Vict. c. 52), s. 89.

(*g*) *Ibid.*, s. 56 (4).

(*h*) *Ibid.*, s. 56 (5). Sects. 56—73 of the Fines and Recoveries Act, 1833

SUB-SECT. 4. **Powers and Duties of Trustee.**

Powers exercisable with permission of committee.

205. With the permission of the committee of inspection (*i*), the trustee has power to do the following things.

(1) Carrying on business.

He may carry on the business of the bankrupt, so far as may be necessary for the beneficial winding up of the same (*k*). If he carries on the business, he must keep a distinct account of the trading; he must incorporate in the cash-book the total weekly amount of the receipts and payments, and must from time to time, and not less than once in every month, verify the account by affidavit, and submit it to the committee of inspection, if any, or such member as may be appointed for the purpose (*l*).

(2) Legal proceedings.

He may bring, institute, or defend any action or other legal proceeding relating to the property of the bankrupt (*m*), or he may assign his rights (*n*), or where a member of a partnership becomes bankrupt the trustee may by leave of the court commence an action in the name of the bankrupt's partner and himself (*o*).

(3 & 4 Will. 4, c. 74), extend and apply to proceedings under the Bankruptcy Act, as if those sections were re-enacted in the Act and made applicable in terms to such proceedings (*ibid.*). The effect of this is, it seems, to enable the trustee to bar an entail, and to make the other dispositions of an estate tail which the commissioner in bankruptcy might make under those sections. As to the effect of those sections, see *Sturgis* v. *Morse* (1860), 29 L. J. (CH.) 768, at p. 774; *Hankey* v. *Martin* (1883), 49 L. T. 560. The trustee can only dispose of that which the bankrupt might have disposed of, if he had not been bankrupt; therefore when the bankrupt was tenant in tail in remainder of copyholds, and by the custom of the manor the entail could not be barred until it fell into possession, and the estate did not fall into possession until after the bankrupt's discharge, it was held that the assignees in bankruptcy had no power to bar the entail (*Johnson* v. *Smiley* (1853), 17 Beav. 223).

(*i*) If there is no committee of inspection, the permission may be given by the Board of Trade (Bankruptcy Act, 1883 (46 & 47 Vict. c. 52), s. 22 (9)), or, subject to the directions of the Board, by the official receiver (Bankruptcy Rules, r. 337), except when he is acting as trustee, when he must get the consent of the Board (*Re Johnstone, Ex parte Singleton* (1885), 2 Morr. 206, *per* CAVE, J., at p. 209; *Re Duncan, Ex parte Duncan*, [1892] 1 Q. B. 331). As to the validity of an act requiring permission when no permission is given, see *Lee* v. *Sangster* (1857), 2 C. B. (N. S.) 1. The permission must be not a general permission to do all or any of the things mentioned in s. 57 of the Bankruptcy Act, 1883, but a permission to do the particular thing or things for which permission is sought in the specified case or cases (s. 57; *Re Vavasour*, [1900] 2 Q. B. 309). See p. 115, *ante*.

(*k*) Bankruptcy Act, 1883 (46 & 47 Vict. c. 52), s. 57 (1). He may, with the permission of the committee of inspection, appoint the bankrupt himself to carry on the business (*ibid.*, s. 64 (1)). Except for the purpose of the beneficial winding up of the bankrupt's business, it can only be carried on with the unanimous consent of all the creditors (*Ex parte Emmanuel, Re Batey* (1881), 17 Ch. D. 35).

(*l*) Bankruptcy Rules, r. 308, Appendix, Forms, Nos. 130—132. Without the express leave of the court he may not purchase goods for the purpose of the business from his employer (if any) or partner (Bankruptcy Rules, r. 316 A).

(*m*) Bankruptcy Act, 1883 (46 & 47 Vict. c. 52), s. 57 (2); and see p. 134, *post*.

(*n*) *Guy* v. *Churchill* (1888), 58 L. J. (CH.) 345. See also *Seear* v. *Lawson* (1880), 15 Ch. D. 426, and *Re Arnold, Ex parte Official Receiver* (1891), 9 Morr. 1. An assignment of a right of action on the terms of sharing what is recovered would possibly not be champertous (*Seear* v. *Lawson, supra*). And see title ACTION, Vol. I., p. 54.

(*o*) Bankruptcy Act, 1883 (46 & 47 Vict. c. 52), s. 113.

He may employ a solicitor or other agent to take any proceedings or do any business which may be sanctioned by the committee of inspection (*p*). (3) Employment of agent.

He may accept as the consideration for the sale of any property of the bankrupt a sum of money payable at a future time subject to such stipulations as to security and otherwise as the committee thinks fit (*q*). (4) Sale on credit.

He may mortgage or pledge any part of the property of the bankrupt for the purpose of raising money for the payment of his debts (*r*). (5) Mortgage.

He may refer any dispute to arbitration, compromise all debts, claims, and liabilities, present or future, certain or contingent, liquidated or unliquidated, subsisting or supposed to subsist, between the bankrupt and any person who may have incurred any liability to the bankrupt, on the receipt of such sums, payable at such times, and generally on such terms as may be agreed on (*s*). (6) Compromise with debtors.

He may make such compromise or other arrangement as may be thought expedient with creditors or persons claiming to be creditors in respect of any debts provable under the bankruptcy (*t*). (7) Compromise with creditors.

He may make such compromise or other arrangement as may be thought expedient with respect to any claim arising out of or incidental to the property of the bankrupt made or capable of being made on the trustee by any person or by the trustee on any person (*a*). (8) Compromise of claims.

He may divide in its existing form amongst the creditors, according to its estimated value, any property which from its Division in specie.

(*p*) Bankruptcy Act, 1883 (46 & 47 Vict. c. 52), s. 57 (3). The sanction must be obtained before the employment, except in cases of urgency, when it must be shown that no undue delay took place in obtaining the sanction (Bankruptcy Act, 1890 (53 & 54 Vict. c. 71), s. 15 (3)). As to the allowance and taxation of the costs of solicitors or other agents, see Bankruptcy Act, 1883, s. 73; Bankruptcy Rules, r. 117. The trustee may not make any arrangement for or accept from the bankrupt, or any solicitor, auctioneer, or any other person that may be employed about a bankruptcy, any gift, remuneration, or pecuniary or other consideration or benefit whatever, beyond the remuneration fixed by the creditors, and payable out of the estate, and may not make any arrangement for giving up or give up any part of his remuneration, either as receiver, manager, or trustee to the bankrupt, or any solicitor or other persons employed in the bankruptcy (Bankruptcy Act, 1883, s. 72 (5); *Re Vavasour*, [1900] 2 Q. B. 309; *Re Howes, Ex parte White*, [1902] 2 K. B. 290; *Re Pryor, Ex parte Board of Trade* (1888), 5 Morr. 232; *Re Gallard, Ex parte Gallard*, [1896] 1 Q. B. 68; *Ex parte Harper, Re Pooley* (1882), 20 Ch. D. 685; *Staniar* v. *Evans, Evans* v. *Staniar* (1886), 34 Ch. D. 470).

(*q*) Bankruptcy Act, 1883 (46 & 47 Vict. c. 52), s. 57 (4).

(*r*) *Ibid.*, s. 57 (5).

(*s*) *Ibid.*, s. 57 (6); *Re Ridgway, Ex parte Hurlbatt* (1889), 6 Morr. 277; *Re A. & T. G. Ridgway, Ex parte Clarke* (1891), 8 Morr. 289. See *Re Macfadyen* [1908], 1 K. B. 678. The debtor cannot object to a compromise properly effected by the trustee and committee (*Re Pilling, Ex parte Salaman*, [1906] 2 K. B. 644).

(*t*) Bankruptcy Act, 1883 (46 & 47 Vict. c. 52), s. 57 (7). As to what are debts provable in bankruptcy, see p. 197, *post*.

(*a*) *Ibid.*, s. 57 (8); see p. 135, *post*.

SUB-SECT. 4. Powers and Duties of Trustee.

peculiar nature or other special circumstances cannot be readily or advantageously sold (*b*).

Disclaimer.

206. The trustee has power to disclaim any part of the property of the bankrupt consisting of land burdened with onerous covenants, of unsaleable shares or stock, or unprofitable contracts, within twelve months of the first appointment of a trustee, or of the date when the trustee first became aware of such property. He must disclaim in writing (*c*).

Secured creditors.

207. In the case of secured creditors the trustee has power, within twenty-eight days after a proof estimating the value of a security has been made use of in voting at any meeting, to call on the creditor to surrender the security on payment of the value estimated with the addition of 20 per cent. (*d*). And where a creditor has valued his security in his proof the trustee can always redeem it on payment of the assessed value (*e*), or if dissatisfied with that value he may require that the property forming the security be offered for sale on agreed terms, or as may be directed. If the sale be by public auction the creditor or the trustee on behalf of the estate may purchase (*f*).

Receipt of proofs.

208. It is the trustee's duty to receive from the official receiver all proofs of debts tendered prior to his appointment, and to give a receipt for them (*g*), and to receive from the creditors all other proofs of debt (*h*).

On the appointment of the trustee the official receiver accounts to him (*i*), and if the trustee is dissatisfied with the account given, he may report the matter to the Board of Trade (*k*), and if the Board refuse to interfere it is his duty to apply to the court for directions (*l*). In every case he is entitled to demand and receive from the official receiver full information concerning the

(*b*) Bankruptcy Act, 1883 (46 & 47 Vict. c. 52), s. 57 (9).

(*c*) *Ibid.*, s. 55 (1), (2), as amended by Bankruptcy Act, 1890 (53 & 54 Vict. c. 71), s. 13; *Re Maughan, Ex parte the Trustee* (1885), 2 Morr. 25. The Court has power to extend the time (*Re G. Price* (1884), 1 Morr. 153). The trustee's time for disclaimer runs from the date of the certificate of his appointment (*Re Cohen*, [1905] 2 K. B. 704). The rule applies to administration of the estate of a deceased insolvent under s. 125 (*Re Mellison, Ex parte Day*, [1906] 2 K. B. 68). On the subject of disclaimer, see pp. 191 *et seq.*, *post*.

(*d*) Bankruptcy Act, 1883 (46 & 47 Vict. c. 52), Sched. I., r. 12.

(*e*) *Ibid.*, Sched. II., r. 12 (a). Compare *Re Tillett, Ex parte Harper* (1890), 7 Morr. 286. As to this power not being inconsistent with the above power to call on a creditor to surrender a security which has been made use of in voting at any meeting, see *Ex parte Norris, Re Sadler* (1886), 17 Q. B. D. 728, at pp. 733, 734.

(*f*) Bankruptcy Act, 1883 (46 & 47 Vict. c. 52), Sched. II., r. 12 (b).

(*g*) Bankruptcy Rules, r. 223.

(*h*) Bankruptcy Act, 1883 (46 & 47 Vict. c. 52), Sched. II., r. 2. As to proof of debts generally, see p. 197, *post*.

(*i*) Bankruptcy Rules, r. 336 (2). The regulations as to accounts do not apply to the official receiver, r. 336 (4); and see generally, as to official receivers, pp. 98 *et seq.*, *ante*.

(*k*) *Ibid.*, r. 336 (3).

(*l*) See *Re Smith, Ex parte Fox* (1886), 17 Q. B. D. 4.

bankrupt and his estate, so as to enable him properly to discharge his duties as trustee (*m*).

SUB-SECT. 4. Powers and Duties of Trustee.

209. It is the trustee's duty to consider and discharge all claims for preferential payments, such as rates, taxes, wages, and salaries (*n*), which rank in priority to all debts save funeral and testamentary expenses (*o*), and when any person is apprenticed or articled to the bankrupt at the time of the presentation of the petition, the trustee may make such payment to him as may seem reasonable under the circumstances (*p*), or may, if such person so desires, and the trustee thinks it expedient, transfer the indentures or articles to someone else (*q*).

Preferential payments.

210. The trustee must, as soon as he conveniently may, declare and distribute dividends amongst the creditors who have proved their debts (*a*).

Dividends.

If the trustee has under his control any unclaimed dividends, which have remained unclaimed for more than six months, or after a final dividend holds any undistributed or unclaimed money arising from the bankrupt's property, he must pay them into the Bankruptcy Estates Account (*b*).

211. The trustee has power to summon a general meeting of creditors for the purpose of ascertaining their wishes, and it is his duty to summon such a meeting if directed to do so by resolution of the creditors, or if so requested in writing by one-fourth of the creditors in value (*c*), or at the request of any creditor who deposits a sufficient sum to cover the cost, and has the concurrence of one-sixth in value (including himself) of the creditors (*d*).

Meetings of creditors.

The trustee may summon a meeting of the committee of inspection as and when he thinks necessary (*e*), or a meeting of creditors to fill any vacancy on the committee (*f*).

SUB-SECT. 5.—*Remuneration and Costs.*

212. The remuneration, if any, of the trustee in bankruptcy is fixed by ordinary resolution by the creditors, or, if the creditors so resolve, by the committee of inspection. It is in the nature of a percentage or commission, part of which is payable on the amount realised after deducting any sums paid to secured creditors out of

Mode of fixing remuneration.

(*m*) Bankruptcy Rules, r. 318 (3).
(*n*) Preferential Payments in Bankruptcy Act, 1888 (51 & 52 Vict. c. 62), s. 1.
(*o*) Bankruptcy Act, 1883 (46 & 47 Vict. c. 52), s. 125 (7); and see p. 217, *post*.
(*p*) Bankruptcy Act, 1883 (46 & 47 Vict. c. 52), s. 41 (1).
(*q*) *Ibid.*, s. 41 (2).
(*a*) *Ibid.*, s. 58 (1). As to dividends generally, see p. 236, *post*.
(*b*) *Ibid.*, s. 162 (1), (2) (a); and see *Re James Pearce, Ex parte Board of Trade* (1884), 1 Morr. 56; *Re Chudley, Ex parte Board of Trade* (1885), 2 Morr. 8. For the Bankruptcy Estates Account, see p. 129, *post*.
(*c*) Bankruptcy Act, 1883 (46 & 47 Vict. c. 52), s. 89 (2), and Sched I., r. 5. As to method of summons, see Bankruptcy Rules, r. 15.
(*d*) Bankruptcy Act, 1890 (53 & 54 Vict. c. 71), s. 18.
(*e*) Bankruptcy Act, 1883 (46 & 47 Vict. c. 52), s. 22 (2).
(*f*) *Ibid.*, s. 22 (7) See p. 66, *ante*.

SUB-SECT. 5. Remuneration and Costs.

the proceeds of their securities, and part on the amount distributed in dividend (*g*), and it is paid out of the assets of the estate, subject to the rule of priority as to costs and charges payable out of the estate (*h*). The resolution must set out what expenses the remuneration is intended to cover, and in respect of those expenses neither the creditors nor the estate are liable (*i*). The creditors or the committee of inspection when voting the remuneration must distinguish between the percentage payable on realisation and that which is payable on moneys distributed (*k*), the former being calculated only on the amount actually realised by the trustee (*l*). In no case when a resolution has been once passed by the creditors or the committee of inspection have they power to rescind it (*m*).

Joint and separate estates.

In the administration of joint and separate estates the creditors of the joint estate or the committee of inspection of such joint estate and the creditors of any separate estate or the committee of such separate estate may fix the trustee's remuneration in respect of their respective estates (*n*).

Voting on remuneration.

No one voting under a general or special proxy may vote for any resolution that would directly or indirectly place him, his partner, or employer in a position to obtain any remuneration out of the estate otherwise than as a creditor rateably with the other creditors (*o*), and on any resolution touching the conduct or remuneration of the trustee the vote of the trustee or his partner or solicitor or solicitor's clerk shall not be reckoned in the majority (*p*).

Where no remuneration voted.

213. Where no remuneration has been voted, the creditors may allow the trustee such proper expenses as he has incurred in the bankruptcy, subject to the sanction of the Board of Trade (*q*).

Whenever the Board of Trade appoint a trustee, the amount of his remuneration is fixed by them (*r*). They have also the power to fix the trustee's remuneration where one-fourth of the creditors in number or value dissent from the resolution of the creditors or committee of inspection fixing it, or if the bankrupt satisfies the Board of Trade that it is unnecessarily large (*s*).

Forfeiture of remuneration.

214. If it appears to the court that any solicitation has been used by or on behalf of a trustee or receiver, except by direction

(*g*) Bankruptcy Act, 1883 (46 & 47 Vict. c. 52), s. 72 (1).
(*h*) See Bankruptcy Rules, r. 125.
(*i*) Bankruptcy Act, 1883 (46 & 47 Vict. c. 52), s. 72 (3).
(*k*) Bankruptcy Act, 1890 (53 & 54 Vict. c. 71), s. 15 (1); Bankruptcy Rules, r. 305.
(*l*) *Re Christie, Ex parte Christie* (1899), 7 Mans. 1. "Amount distributed" means distributed out of assets realised by the trustee. All resolutions for remuneration purporting to extend the statute are *ultra vires* (*ibid.*).
(*m*) *Re Marsden, Ex parte Board of Trade* (1892), 9 Morr. 70.
(*n*) Bankruptcy Rules, r. 270.
(*o*) Bankruptcy Act, 1883 (46 & 47 Vict. c. 52), Sched. I., r. 26.
(*p*) *Ibid.*, s. 88.
(*q*) Bankruptcy Act, 1890 (53 & 54 Vict. c. 71), s. 15 (2).
(*r*) Bankruptcy Rules, r. 307. For the appointment of trustees by the Board of Trade, see Bankruptcy Act, 1883 (46 & 47 Vict. c. 52), ss. 21 (6), 87 (3). In practice the Board of Trade never appoint a trustee. Where the creditors fail to appoint one, the official receiver remains trustee (see p. 108, *ante*).
(*s*) Bankruptcy Act, 1883 (46 & 47 Vict. c. 52), s. 72 (2); *Re Gallard, Ex part*

SUB-SECT. 5. Remuneration and Costs.

of a meeting of creditors, in obtaining proxies or for the purpose of procuring a trusteeship, the court may deprive him of his remuneration, even if the creditors or committee have passed a resolution to the contrary (*t*); and if without adequate explanation to the Board of Trade he has retained for more than ten days a sum exceeding £50 or such other sum as he may be authorised to retain, he will have no claim to remuneration, and will be liable for any expenses resulting from his default (*a*).

No payment beyond remuneration.

215. The trustee must not make any arrangement for or accept from the bankrupt or from any solicitor, broker, auctioneer, or other person employed in the bankruptcy any gift or consideration whatever beyond the remuneration fixed by the creditors (*b*), and as trustee he may not receive any payment for his services other than what he is entitled to under the Bankruptcy Acts and Rules (*c*). Where a trustee receives remuneration for his services, no payment is allowed in his accounts for any person performing duties which the trustee himself ought to perform (*d*).

Solicitor trustee.

If a solicitor is a trustee he may contract that his remuneration shall include all professional services (*e*), or he may agree to conduct all proceedings for a lump sum provided it is fair and reasonable (*f*).

Taxation of costs.

216. No payment is allowed in a trustee's accounts for the bills or charges of solicitors, accountants, or managers, not being trustees, without proof that they have been taxed by the prescribed officer, that is to say, in the High Court the taxing master, and in a county court the registrar, and the taxing officer must satisfy himself that proper sanction has been given prior to the employment of the solicitors or others in respect of each matter under which the charges have arisen, or in cases of urgency that no undue delay took place in obtaining permission subsequently (*g*).

Harris (1892), 9 Morr. 52; and see *Re Shirley, Ex parte Board of Trade* (1892), 9 Morr. 147, for the principles on which the Board of Trade should proceed in performing these duties.

(*t*) Bankruptcy Act, 1883 (46 & 47 Vict. c. 52), Sched. I., r. 20.

(*a*) *Ibid.*, s. 74 (6). He is also liable to pay interest on the amount retained (*ibid.*); and see p. 130, *post*.

(*b*) *Ibid.*, s. 72 (5).

(*c*) Bankruptcy Rules, r. 306. Where the trustee is a solicitor, the committee cannot resolve that his remuneration shall be on the scale of his professional charges as a solicitor (*Re Wayman, Ex parte Board of Trade* (1889), 6 Morr. 272).

(*d*) Bankruptcy Act, 1883 (46 & 47 Vict. c. 52), s. 73 (1). Where a trustee, by sanction of the creditors, employs a solicitor in purely administrative work, the charges therefor must not be on the same scale as for professional work as a solicitor, but must be fair and reasonable (*Re Pryor, Ex parte Board of Trade* (1888), 5 Morr. 232).

(*e*) Bankruptcy Act, 1883 (46 & 47 Vict. c. 52), s. 73 (2). Compare *Re Wayman, Ex parte Board of Trade, supra*, as to scale of remuneration.

(*f*) Compare *Re Owen, Ex parte Peyton* (1885), 2 Morr. 87.

(*g*) Bankruptcy Act, 1883 (46 & 47 Vict. c. 52), s. 73 (3); Bankruptcy Act, 1890 (53 & 54 Vict. c. 71), s. 15 (3); Bankruptcy Rules, r. 117. The sanction must in general be obtained prior to the employment in each matter (*Re Duncan, Ex parte Duncan* (1891), 8 Morr. 297; *Re G. Gallard, Ex parte H.*

SUB-SECT. 5. Remuneration and Costs.

Review of taxation.

Where such bills and charges have been taxed in a county court, the Board of Trade may require the taxation to be reviewed by a taxing master of the High Court, and on due notice given to the person whose bill is to be reviewed the review takes place (*h*), when the taxing master gives a certificate (*i*), and such costs to the person whose bill is reviewed as he may think proper as incidental to his appearance at the review (*k*). This power cannot be exercised by the Board of Trade in the case of strangers who are in litigation with the trustee, but only in the case of solicitors, managers, auctioneers, brokers, or others employed by the trustee (*l*), and there is a right of appeal from the review by the taxing master to the judge of the High Court (*m*).

The trustee must at a reasonable period before declaring a dividend request the persons employed by him to deliver their bills and charges to the proper officer for taxation, and, if they fail to do so within seven days or such extended time as may be allowed, he may distribute the dividend without regard to their claims, which will be forfeited as against the estate and the trustee (*n*).

Liability for official receiver's charges.

217. When a trustee takes over a bankrupt estate from the official receiver, he is liable for the costs and charges properly incurred by, and payable to, the official receiver, and must undertake to discharge any guarantees properly given by him (*o*). Until such costs are paid, the official receiver has a lien upon the estate for them (*p*).

The trustee is also liable to pay out of any available assets in his hands the costs of convening a meeting to consider any resolution of the committee of inspection (*q*).

Personal liability for costs.

218. He is in general personally liable for all costs incurred in the course of litigation instituted by him or against him (*r*), save where an action is brought against him as representing the estate, or he is made a party to any cause on the application of any other party thereto, and the court does not direct that he shall be liable (*s*). But where he has brought or defended an action with the consent of the committee of inspection or the court, as the case may be, he has a right to be indemnified out of the estate for any costs which he is ordered to pay or incurs unless the court orders him to pay

Gallard (1895), 2 Mans. 515; and see p. 123, note (*p*), *ante*). As to who are prescribed officers for the High Court, see Bankruptcy Rules, r. 105, and for a county court, r. 111.

(*h*) Bankruptcy Rules, r. 124 (1), (2).

(*i*) Compare *ibid.*, r. 124 (4), as to effect of the certificate.

(*k*) *Ibid.*, r. 124 (5).

(*l*) Compare *Re Hunt, Ex parte Board of Trade*, [1898] 1 Q. B. 287.

(*m*) *Re Alison, Ex parte Jaynes*, [1892] 2 Q. B. 587.

(*n*) Bankruptcy Act, 1883 (46 & 47 Vict. c. 52), s. 73 (4).

(*o*) Bankruptcy Rules, r. 318 (1), and see p. 107, *ante*.

(*p*) *Ibid.*, r. 318 (2).

(*q*) *Ibid.*, r. 319.

(*r*) *Bornemann* v. *Wilson* (1884), 51 L. T. 728, and *School Board for London* v. *Wall Brothers* (1891), 8 Morr. 202, where the trustee adopted the action, although there was no order making him a party.

(*s*) Bankruptcy Rules, r. 108 (3); see further, p. 135, *post*.

such costs or any of them personally (*t*). The same rule applies generally to the official receiver when acting as trustee (*u*). An appeal lies from a decision as to costs (*a*). SUB-SECT. 5. Remuneration and Costs.

SUB-SECT. 6.—*Accounts and Audit.*

219. Under the present bankruptcy law provision is made for official custody and control over all moneys received and disbursed in the administration of the estates of bankrupts. For this purpose an account at the Bank of England is kept by the Board of Trade called the Bankruptcy Estates Account, into which all moneys received by official receivers, trustees, and others in respect of proceedings under the Bankruptcy Acts must be paid (*b*). Every trustee is required, in such manner and at such times as the Board of Trade, with the concurrence of the Treasury, direct, to pay in to this account the moneys received by him, for which he receives a certificate of receipt (*c*), and regulations are from time to time made by the Board of Trade prescribing the time at which and the manner in which moneys received by trustees are to be paid into it (*d*). Bankruptcy Estates Account.

In the case, however, of authority being given in certain circumstances by the Board of Trade, on the application of the committee of inspection, the trustee may open an account at a local bank in the name of the bankrupt's estate and pay money into and out of that account instead of paying it into the Bankruptcy Estates Account (*e*). Account at local bank.

In small bankruptcies, when the debtor has at the date of the receiving order an account at a bank, the trustee need not withdraw the money standing in the account until seven days after Small bankruptcies.

(*t*) *Angerstein* v. *Angerstein* (1874), 9 Ch. App. 479; *Re Arden, Ex parte Arden* (1884), 2 Morr. 1, 4. A trustee must not appear on an appeal when there is no need of his presence (*Re Lock, Ex parte Poppleton* (1891), 8 Morr. 51, 57; *Re Tetley* (1896), 3 Mans. 226, 236; *Re Saunders, Ex parte Leigh* (1896), 13 T. L. R. 108; *Re Vanderhaege, Ex parte Viney*, [1888] W. N. 7); where a trustee shows carelessness in initiating litigation he may be condemned in costs personally (*Re Bryant, Ex parte Gordon* (1889), 6 Morr. 262).

(*u*) Compare *Re Wilkinson, Ex parte Official Receiver* (1884), 1 Morr. 65, 71; *Re Glanville, Ex parte the Trustee* (1885), 2 Morr. 71, at p. 77. See also Bankruptcy Rules, r. 231, by which the official receiver is protected from liability in relation to an appeal from his decision rejecting a proof.

(*a*) Compare *Re Wainwright, Ex parte Wainwright* (1881), 19 Ch. D. 140.

(*b*) Bankruptcy Act, 1883 (46 & 47 Vict. c. 52), s. 74 (1). The moneys to be thus paid by a trustee consist, in the case of a sale of any part of the bankrupt's estate through an auctioneer or agent, of the gross proceeds of the sale (Bankruptcy Rules, r. 295; *Board of Trade* v. *Provident Clerks' and General Guarantee Association, Ltd.* (1895), 72 L. T. 562; see p. 121, *ante*). With regard to the costs, charges, and expenses of the auctioneer or agent, see p. 127, *ante*.

(*c*) *Ibid.*, s. 74 (3); and compare *Re James Pearce, Ex parte Board of Trade* (1884), 1 Morr. 56, as to application by the Board of Trade to the Court to enforce their orders.

(*d*) See Board of Trade Regulations, Reg. 37, printed in Chalmers and Hough on the Bankruptcy Acts, 6th ed., pp. 784 *et seq.*

(*e*) Bankruptcy Act, 1883 (46 & 47 Vict. c. 52), s. 74 (4); Bankruptcy Rules, rr. 312, 340, Appendix, Forms, Nos. 136, 137. See p. 115, *ante*.

SUB-SECT. 6. Accounts and Audit.

the day appointed for the first meeting of creditors, unless the Board of Trade for sufficient cause otherwise direct (*f*).

Retention of moneys by trustee.

220. In no circumstances must the trustee pay any moneys received by him as such into his private banking account (*g*); and he must not keep in his possession more than £50 of such moneys or such other sum as the Board of Trade may authorise in any particular case to be retained by him for a longer period than ten days, and, unless he can explain the retention to the satisfaction of the Board of Trade, he must pay interest on the money retained at the rate of 20 per cent. per annum (*h*). The interest chargeable under this provision is payable to the bankrupt's estate, and not to the Treasury (*i*).

Mode of payments.

221. All payments of money standing to the credit of the Bankruptcy Estates Account are made in the manner prescribed by Board of Trade regulations (*j*). A trustee who requires money for discharging disbursements and expenses must apply to the Inspector-General's Department of the Board of Trade for a cheque on the Bankruptcy Estates Account, and dividends are paid by cheques or orders issued to the persons entitled to them by the Board of Trade, except in the case of small dividends, which are often paid by money orders (*k*).

Books to be kept.

222. The trustee must keep proper books, the nature of which is prescribed by rules, in which he must make entries or minutes of proceedings at meetings, and of such other matters as may be prescribed. The books thus kept may, subject to the control of the court, be inspected by a creditor personally or by his agent (*l*). But the bankrupt has no right to inspect the books, nor has the court power to give him leave to do so (*m*).

The books which the trustee must keep are a "record book," in which he must enter all minutes, a record of all proceedings had, of resolutions passed at any meeting of creditors or of the committee of inspection, and of all such matters as may be necessary to give a correct view of his administration of the estate (*n*), and a "cash-book," in such form as the Board of Trade may direct, in which he

(*f*) Bankruptcy Act, 1883 (46 & 47 Vict. c. 52), s. 74 (5); and see Bankruptcy Rules, r. 273 (6). As to small bankruptcies, see p. 294 *et seq.*, *post*.

(*g*) Bankruptcy Act, 1883 (46 & 47 Vict. c. 52), s. 75.

(*h*) *Ibid.*, s. 74 (6); and see p. 127, *ante*. Where the trustee has been removed, such interest is calculated up to the date of audit, and not merely to the date of his removal (*Re Tatum, Ex parte Board of Trade* (1889), 6 Morr. 107). Where a trustee has failed to pay such interest, the court has jurisdiction to commit him to prison under s. 4 of the Debtors Act, 1869 (32 & 33 Vict. c. 62), such interest being in the nature of a penalty (*Re Nicholson, Ex parte Board of Trade* (1890), 7 Morr. 257; see p. 337, *post*).

(*i*) *Re Sims, Ex parte Official Receiver*, [1907] 2 K. B. 36.

(*j*) Bankruptcy Act, 1883 (46 & 47 Vict. c. 52), s. 74 (7).

(*k*) Board of Trade Regulations, Reg. 39, 40. A cheque for a dividend will ordinarily not be issued to an assignee of a creditor (*Re Frost, Ex parte Official Receiver*, [1899] 2 Q. B. 50).

(*l*) Bankruptcy Act, 1883 (46 & 47 Vict. c. 52), s. 80.

(*m*) *Re Solomons, Ex parte Solomons*, [1904] 2 K. B. 760 and, on appeal, 917.

(*n*) Bankruptcy Rules, r. 285.

must enter from day to day the receipts and payments made by him (*o*).

These books must be submitted to the committee of inspection, together with any other necessary books and vouchers, whenever required, but not less than once in every three months (*p*), and the cash-book must be audited by the committee not less than once every three months, the day on which the audit takes place being certified in the cash-book by them under their hands (*q*). Inspection of books.

Upon a trustee resigning or being released or removed he must deliver over to the official receiver or new trustee all the books kept by him (*r*), and until he has complied with this rule his release will not be effective (*s*). Custody of books.

In cases where the trustee is carrying on the bankrupt's business he must keep a distinct account of the trading; and he must incorporate in the cash-book the total weekly amounts of the receipts and payments in the trading (*t*). The trading account must also be verified by an affidavit to be made by him from time to time, which affidavit must be placed with his papers for transmission when required to the Board of Trade, and at least once in every month the committee of inspection, or such member of it as may have been appointed for that purpose, must examine and certify the account (*a*). Trading account.

223. The trustee at least twice a year during the tenure of his office, and at such other time as may be prescribed by rules (*b*), must send to the Board of Trade, or as they may direct, an account of his receipts and payments as such trustee (*c*); and the account must be in the form prescribed by the rules and made in duplicate and stamped and verified by a statutory declaration of the trustee in the form prescribed (*d*). Accounts to Board of Trade.

If a receiving order be made against debtors in partnership distinct accounts must be kept of the joint and separate estates (*e*).

The form of accounts and regulations as to their transmission at present prescribed are as follows: At the expiration of six months from the date of the receiving order, and at the expiration of every six months thereafter until he has been released, the trustee is required to transmit to the Board of Trade a duplicate copy of his cash-book for the period of the preceding six months together with the necessary vouchers and copies of the certificate of audit of his accounts by the committee of inspection. With the first accounts must also be forwarded a summary of the debtor's statement of affairs, showing the amount of the assets realised and Regulations.

(*o*) Bankruptcy Rules, r. 286.
(*p*) *Ibid.*, r. 287.
(*q*) *Ibid.*, r. 288. See *ibid.*, Appendix, Forms, No. 128.
(*r*) *Ibid.*, r. 292.
(*s*) *Ibid.*, r. 310 A; and see p. 113, *ante*.
(*t*) *Ibid.*, r. 308 (1).
(*a*) *Ibid.*, r. 308 (2); and see p. 115, *ante*.
(*b*) *Ibid.*, r. 289.
(*c*) Bankruptcy Act, 1883 (46 & 47 Vict. c. 52), s. 78 (1).
(*d*) *Ibid.*, s. 78 (2).
(*e*) Bankruptcy Rules, r. 293.

SUB-SECT. 6. Accounts and Audit.

with an explanation of the cause for the non-realisation of that part of the assets which is unrealised (*f*). If since the appointment of the trustee or the last audit of his accounts the trustee has paid or has received nothing, he must, when required, forward to the Board of Trade a stamped affidavit to that effect (*g*), and must himself pay for the stamp.

When the estate has been fully realised and distributed, or if the adjudication is annulled, the trustee must forthwith send in his accounts to the Board of Trade, although the six months may not have expired; and the accounts then sent in must be certified and verified according to form (*h*).

Creditor's right to accounts.

224. Any creditor, with the concurrence of one-sixth of the creditors, including himself, may call upon the official receiver or trustee to furnish and transmit to the creditors a statement of the accounts up to the date of such notice, and the official receiver or trustee, on being furnished with a deposit of a sum sufficient to cover the costs of the accounts, must comply with the request (*i*).

A creditor also who has proved his debt may apply to the trustee for a copy of the accounts or any part thereof relating to the estate as shown by the cash-book up to date, and on paying for the same at the rate of threepence per folio he is entitled to such copy (*j*).

Audit by Board of Trade.

225. The Board of Trade audits the accounts sent in by the trustee, and for the purposes of the audit the trustee must furnish the Board with such vouchers and information as they may require, and the books and accounts kept by him are also to be produced for inspection when required (*k*). When so audited, one copy of the accounts is kept and filed by the Board of Trade, and the other copy must be filed with the court; each copy must be open to the inspection of any creditor, the bankrupt, or any person interested (*l*).

Disallowances.

The Board of Trade may call upon the trustee to account for any misfeasance, neglect, or omission which may appear in his accounts or in any statements required of him, and may require him to make good any loss which the estate of the bankrupt may have sustained by his misfeasance, neglect, or omission (*m*). The court will on the application of the Board of Trade enforce their disallowances and requirements (*n*).

(*f*) Bankruptcy Rules, r. 289 (1); Board of Trade Regulations, Reg. 1.
(*g*) Bankruptcy Rules, r. 291; *Re Rowlands, Ex parte Board of Trade* (1887), 4 Morr. 70.
(*h*) *Ibid.*, r. 289 (2), (3); *ibid.*, Appendix, Forms, No. 129.
(*i*) Bankruptcy Act, 1890 (53 & 54 Vict. c. 71), s. 17. The costs to be deposited are to be calculated at the rate of threepence per folio for each statement where the creditors do not exceed ten, and where they do exceed ten, then 1*s.* per folio for the preparation of the statement, and the actual cost of printing, and by the section itself the sum so paid may be repaid out of the estate, if the creditors or the court so direct (Bankruptcy Rules, r. 315).
(*j*) Bankruptcy Rules, r. 314.
(*k*) Bankruptcy Act, 1883 (46 & 47 Vict. c. 52), s. 78 (3).
(*l*) *Ibid.*, s. 78 (4).
(*m*) *Ibid.*, s. 81 (2).
(*n*) *Ibid.*, s. 102 (5).

SUB-SECT. 6. Accounts and Audit.

When the accounts have been audited, the Board of Trade certifies that the account has been duly passed, and thereupon the duplicate copy bearing a like certificate must be sent to the registrar and filed with the proceedings in the bankruptcy (*o*).

In small bankruptcies, instead of a copy of the account being filed, a statement in the prescribed form showing the position of the estate is filed (*p*).

Accounts after release or removal.

226. The Board of Trade has power to demand an account from the trustee even after he has been released (*q*) or removed (*r*), and it is not necessary for them to prove that there are unclaimed dividends in his hands or under his control (*s*). In case of refusal or default, the Board may apply to the court for an order enforcing compliance with its order, or, if the court thinks fit, an immediate order for committal may be made on application (*t*). Where the court makes an order for committal on the application of the Board of Trade either to enforce payment into the Bankruptcy Estates Account or to obtain accounts, in practice the order lies in the office for a certain period to enable the trustee to comply with it (*a*), but where a trustee has become bankrupt between the application for committal and the decision of the court thereon, the court will not without evidence of wilful disobedience or improper dealing commit the trustee to prison (*b*).

SUB-SECT. 7.—*Actions and Legal Proceedings by and against Trustee.*

Rights or causes of action.

227. Included in the property of a bankrupt debtor which is vested in his trustee in bankruptcy for administration for the benefit of his creditors are certain rights or causes of action (*c*). These rights or causes of action he can, as owner of them, and independently of any other provisions in the Bankruptcy Acts, enforce as a litigant (*d*). The trustee is also liable in certain cases to be made or joined as a defendant in actions by other parties (*e*).

(*o*) Bankruptcy Rules, r. 290.

(*p*) *Ibid.*, r. 273 (10).

(*q*) Compare *Re Chudley, Ex parte Board of Trade* (1884), 2 Morr. 8.

(*r*) Compare *Re Rogers, Ex parte Board of Trade* (1887), 4 Morr. 67, where the trustee was appointed under a scheme of arrangement.

(*s*) *Re Cornish, Ex parte Board of Trade* (1895), 3 Mans. 48; and see *Re Calderwood, Ex parte Board of Trade* (1889), 6 Morr. 104, where a receiver was appointed under a liquidation petition, a scheme was accepted, and the debtor discharged, there being no evidence of money in the trustee's hands.

(*t*) Bankruptcy Act, 1883 (46 & 47 Vict. c. 52), s. 102 (5); *Re Margetts, Ex parte Board of Trade* (1884), 1 Morr. 211.

(*a*) *Re Tatum, Ex parte Board of Trade* (1889), 6 Morr. 107; *Re Gallant, Ex parte Board of Trade* (1893), 10 Morr. 128; *Re Nicholson, Ex parte Board of Trade* (1888), 5 Morr. 278.

(*b*) *Re Calderwood, Ex parte Board of Trade* (1891), 8 Morr. 135; and compare *Re Tatum, Ex parte Harker* (1889), 6 Morr. 179, where the trustee's sureties paid the amount demanded under the order of the Board of Trade.

(*c*) *Re Byrne, Ex parte Henry* (1892), 9 Morr. 213 (action for commission); *Re Perkins*, [1898] 2 Ch. 182 (right to sue on covenant of indemnity given to bankrupt); *Wolff* v. *Van Boolen* (1903), 94 L. T. 502 (right to set aside settlement).

(*d*) *Leeming* v. *Lady Murray* (1879), 13 Ch. D. 123.

(*e*) *School Board for London* v. *Wall Brothers* (1891), 8 Morr. 202.

SUB-SECT. 7. **Actions and Proceedings by and against Trustee.**

228. But, in order to protect the creditors of an estate and also the trustee himself, the Bankruptcy Act, 1883, provides that the trustee in a bankruptcy may, with the sanction of the committee of inspection, bring, institute, or defend any action or other legal proceeding relating to the property of the bankrupt, and compromise any actions brought by or against him (*f*).

Powers of trustee as to actions.

This provision applies only as between the trustee and the estate and the creditors. It has not the effect of precluding the trustee as owner of a cause of action from litigating it, or as defendant to an action from resisting it, without the consent of anyone (*g*), or from compromising an action to which he is a party. An opposing litigant could not plead in answer to the claim or defence of a trustee in bankruptcy as such that the trustee has not obtained the consent of the committee of inspection to the institution or defence of the action, as the case may be (*g*). The effect of the provision is that the trustee loses his right to be paid out of the bankrupt's property the costs and expenses which he may have to pay or may incur in respect of such an action if he has not, before commencing it or defending it, obtained the consent of his committee of inspection (*h*).

Permission of Board of Trade.

229. Where no committee of inspection has been appointed by the creditors, the permission for litigation by the trustee is given by the Board of Trade, who act in such a case by the official receiver (*i*). If the official receiver is trustee the permission is given by the Board of Trade (*k*). The permission may limit the amount of money to be expended (*k*), and if the limit of expenditure sanctioned by the committee is exceeded, or if the trustee has proceeded with an action or a defence to an action without first obtaining the required permission, he may in the first case lose his right to indemnity out of the estate for any expenses incurred by him in excess of the permitted limit and in the second case lose his right to any indemnity at all (*l*). If he has obtained the necessary permission to bring or defend an action, he is entitled as of right to be paid out of the estate all costs and expenses which he may have to pay or may incur, unless for good reason the Court thinks fit to order him or leave him to bear the whole or any part of such costs or expenses personally (*m*).

(*f*) Bankruptcy Act, 1883 (46 & 47 Vict. c. 52), s. 57 (2), (7), (8), and see s. 89. As to the position of a trustee in bankruptcy in arbitrations, see title ARBITRATION, Vol. I., pp. 442, 444, 450.

(*g*) *Leeming* v. *Lady Murray* (1879), 13 Ch. D. 123, 128.

(*h*) *Re White, Ex parte Nichols*, [1902] W. N. 114; *Re Duncan, Ex parte Official Receiver*, [1892] 1 Q. B. 879.

(*i*) Bankruptcy Act, 1883 (46 & 47 Vict. c. 52), s. 22 (9); Bankruptcy Rules, r. 337.

(*k*) *Re Duncan, Ex parte Official Receiver, supra.*

(*l*) See note (*h*), *supra.*

(*m*) Bankruptcy Rules, r. 125. A trustee in bankruptcy suing in the High Court will not be ordered to give security for costs (*Cowell* v. *Taylor* (1885), 31 Ch. D. 34). In the county court if the trustee continues an action brought by the bankrupt, he must give security for costs (County Courts Act, 1888 (51 & 52 Vict. c. 43), s. 94). This does not apply to an action brought in the High Court and ordered to be tried in the county court (*Hemming* v. *Davies*, [1898] 1 Q. B. 660).

SUB-SECT. 7. Actions and Proceedings by and against Trustee.

230. Where a trustee brings or defends an action as a litigant, he is as between himself and the other parties to the action like any other litigant; that is to say, he must pay any debt, damages, or costs which the other litigants recover against him out of his own pocket, and get reimbursement, if entitled to it, out of the bankrupt's property (*n*). Consequently a prudent trustee should, before embarking in litigation as plaintiff or defendant, see that he has sufficient estate in hand for his indemnity, or else obtain an indemnity from the creditors (*n*). But in cases in which a trustee is, at the instance of other parties, made a party to an action as representing the estate of the debtor, he will not be made personally liable for costs incurred to the opposing parties, unless ordered by the court to pay them personally (*o*).

Trustee as litigant.

The trustee may bring, or may be made defendant or a party to, an action in his own name, or in the official name and title of "The Trustee of the property of A. B., a bankrupt" (*p*). If he brings an action in the High Court, he should bring it in the division to which bankruptcy business is for the time being assigned, unless the action is one of a class specially assigned to one of the other divisions of the High Court by the Judicature Acts and rules (*q*).

Procedure.

231. Incidental to the power to bring and defend an action is the power to compromise an action which has been begun (*r*). This right is inherent in the trustee, but, in order to make any compromise of an action valid as between the trustee and his estate, he must obtain the sanction of the committee of inspection to the compromise (*s*), or, if the sanction is refused by the committee and the creditors generally, he must obtain the sanction of the court (*t*).

Power of compromise.

232. If any of the creditors are desirous that an action should be brought by the trustee for the benefit of the estate, and he refuses to do so, they may apply for leave to proceed in his name on giving him a full indemnity (*a*), which leave is only given, where the official receiver is trustee, on an ample indemnity being given by a deposit of money in court. When such an action is brought, the trustee is liable for costs to the opposing litigant just as if he were a willing party to the action (*b*).

Creditors' right to sue.

233. The rights or claims which the trustee may enforce by action or to which he may be liable as representing the estate fall into two

Rights and claims passing to trustee.

(*n*) *Ex parte Angerstein, Re Angerstein* (1874), 9 Ch. App. 479; *Pitts* v. *La Fontaine* (1880), 6 App. Cas. 482; *Watson* v. *Holliday* (1882), 20 Ch. D. 780; *Re Mackenzie, Ex parte Sheriff of Hertfordshire*, [1899] 2 Q. B. 566, 578; *Re Bryant, Ex parte Gordon* (1889), 6 Morr. 262.

(*o*) Bankruptcy Rules, r. 108 (3).

(*p*) Bankruptcy Act, 1883 (46 & 47 Vict. c. 52), s. 83.

(*q*) Bankruptcy Rules, r. 101.

(*r*) *Leeming* v. *Lady Murray* (1879), 13 Ch. D. 123.

(*s*) Bankruptcy Act, 1883 (46 & 47 Vict. c. 52), ss. 57 (6), (8), 89.

(*t*) *Ibid.*, s. 89; *Re Ridgway, Ex parte Hurlbatt* (1889), 6 Morr. 277; *Re Ridgway, Ex parte Clarke* (1891), 8 Morr. 289; *Re Pilling, Ex parte Salaman*, [1906] 2 K. B. 644.

(*a*) *Ex parte Kearsley, Re Genese* (1886), 17 Q. B. D. 1.

(*b*) See Chalmers and Hough on the Bankruptcy Acts, 6th ed., pp. 173, 174.

SUB-SECT. 7. Actions and Proceedings by and against Trustee.

classes, namely, actions which at the commencement of the bankruptcy are pending by or against the bankrupt, and rights of action which are vested in the bankrupt at the commencement of the bankruptcy, or which devolve on the bankrupt during the bankruptcy (*i.e.* before the bankrupt obtains a discharge from his debts).

(1) Actions pending by or against bankrupt.

234. As to the first class, if the right of action which the bankrupt is enforcing is one which vests in the trustee or which he is entitled to enforce for the benefit of the creditors, the trustee may on an *ex parte* application by himself or any party to the action to the court in which the action is pending, alleging the devolution of the right of action, become a party to the action in the place of or with the bankrupt as plaintiff (*c*), otherwise the action abates (*d*).

If the pending action is against the bankrupt, and it is not one which will be restrained or stayed on the ground that the claim is provable, the trustee can be made a party as defendant on an *ex parte* application by the plaintiff or by one of the other parties to the action (*e*). Where the bankrupt is plaintiff, if the trustee becomes a party, he adopts the whole action as from the commencement, and may be liable for the whole of the costs if he is unsuccessful (*f*). When the bankrupt is defendant, if the trustee unsuccessfully contests the plaintiff's claim, he may be liable for the whole costs of the defence (*f*); but if he is simply made a party for the convenience of the other parties and leaves matters to the court, he will in general not have to pay any costs to any opposite party (*g*).

Transfer to bankruptcy court.

Where an action brought either by or against the bankrupt is pending in the High Court, and a receiving order is made in the High Court against the bankrupt, the judge making the order may, without any further consent, transfer the action to himself if he thinks fit (*h*). It lies in the discretion of the court (*i*), however, to make or refuse the transfer, and a transfer will not be made unless it is shown that it will be of advantage to the estate (*j*). The application for a transfer should not be made *ex parte*.

(2) Rights of action vested in or devolving on bankrupt.

235. The rights falling under the second class may be enforced by action by the trustee, unless the cause of action is one which

(*c*) R. S. C., Ord. 17, rr. 3, 4; *Emden* v. *Carte* (1881), 17 Ch. D. 169. A trustee who refuses to continue an action commenced by the bankrupt is not barred from commencing an action in his own name for the same cause (*Bennett* v. *Gamgee* (1877), 2 Ex. D. 11).

(*d*) *Jackson* v. *North Eastern Rail. Co.* (1877), 5 Ch. D. 844; *Eldridge* v. *Burgess* (1878), 7 Ch. D. 411; see *Selig* v. *Lion*, [1891] 1 Q. B. 513. If one of two or more plaintiffs is bankrupt his trustee may be substituted as plaintiff (*Hoare* v. *Baker* (1887), 4 T. L. R. 26).

(*e*) *Watson* v. *Holliday* (1882), 20 Ch. D. 780.

(*f*) *School Board for London* v. *Wall Brothers* (1891), 8 Morr. 202.

(*g*) Bankruptcy Rules, r. 108 (3).

(*h*) Bankruptcy Act, 1883 (46 & 47 Vict. c. 52), s. 102 (4).

(*i*) *Re Somes, Ex parte Deller* (1895), 2 Mans. 396.

(*j*) *Re Ross, Ex parte the Trustee* (1888), 5 Morr. 281; and see *Re White & Co., Ex parte Official Receiver* (1884), 1 Morr. 77; *Re Champagné, Ex parte Kemp* (1893), 10 Morr. 285, as to the considerations which guide the court in making a transfer. The trustee must show a higher and better title by the bankruptcy law than the bankrupt possessed.

SUB-SECT. 7. Actions and Proceedings by and against Trustee.

from its nature does not vest in the trustee, or to the benefit of which the estate is not entitled. Rights of action which vest in the trustee by virtue of the superior title which in some cases is conferred on him by the Bankruptcy Acts, as, for instance, the right to recover money or property transferred by way of fraudulent preference or the right to recover property in the reputed ownership of the bankrupt, may be enforced by the trustee by action.

Mode of enforcement.

The legal proceeding by which these rights of the trustee should be enforced is usually an application to the bankruptcy court under its jurisdiction conferred by s. 102 of the Bankruptcy Act, 1883 (*k*), and, where the matter at issue involves questions of bankruptcy law, the bankruptcy court is the tribunal in which proceedings should be taken, unless, from the nature of the allegations made on one side or the other or (in county court bankruptcies) the magnitude of the property involved, the claim ought to be enforced by action in the High Court (*l*).

Principles on which trustee's right based.

236. The principles which determine whether a cause of action, which has accrued to the bankrupt before the bankruptcy or accrues to him during the continuance of the bankruptcy, does or does not pass to the trustee are the following. All rights of action which relate directly to the bankrupt's property and can be turned into assets for the payment of debts pass to the trustee (*m*), but where a

(*k*) 46 & 47 Vict. c. 52.

(*l*) *Ibid.*, s. 102; *Ex parte Brown, Re Yates* (1879), 11 Ch. D. 148; *Ex parte Dickin, Re Pollard* (1878), 8 Ch. D. 377.

(*m*) See *Rose* v. *Buckett*, [1901] 2 K. B. 449, *per* COLLINS, L.J., at p. 454; *Beckham* v. *Drake* (1849), 2 H. L. Cas. 579, at pp. 596, 627, for the general principles on which it is determined whether a right of action does or does not pass to the trustee.

Among the actions the right to prosecute which does not pass are actions for wages or "personal earnings" where these are no more than sufficient for the bankrupt's maintenance (see *post*, p. 166); for breach of promise of marriage (*Beckham* v. *Drake, supra*); slander (*Benson* v. *Flower* (1630), W. Jo. 215); seduction (*Howard* v. *Crowther* (1841), 8 M. & W. 601); trespass, where the only grievance is personal annoyance to the bankrupt (*Clark* v. *Calvert* (1819), 8 Taunt. 742; *Brewer* v. *Dew* (1843), 11 M. & W. 625; *Rogers* v. *Spence* (1846), 12 Cl. & F. 700; *Rose* v. *Buckett*, *supra*); negligence or breach of duty on the part of a solicitor causing personal annoyance, such as restraint of the person (*Wetherell* v. *Julius* (1850), 10 C. B. 267); negligence causing personal injury; assault; false imprisonment and malicious prosecution (see *Drake* v. *Beckham* (1843), 11 M. & W. 315, at p. 319). If a bankrupt brings such an action and obtains damages, the trustee cannot intervene in the action and obtain an order for the payment of the amount of damages to him (*Ex parte Vine, Re Wilson* (1878), 8 Ch. D. 364), but *quære* whether, if the sum awarded is more than is needed for the maintenance of the bankrupt and his family, the trustee could not call upon the bankrupt to account to him for the surplus (see *Re Roberts*, [1900] 1 Q. B. 122; *Re Graydon, Ex parte Official Receiver*, [1896] 1 Q. B. 417; *Re Ashby, Ex parte Wreford*, [1892] 1 Q. B. 872).

A bankrupt whose adjudication has not been set aside cannot bring an action against a person for maliciously procuring the adjudication (*Metropolitan Bank* v. *Pooley* (1885), 10 App. Cas. 210). Nor can a bankrupt bring an action for maintenance on the ground that the defendant incited and supported bankruptcy proceedings in which he had no interest; such a cause of action, if any, passes to the trustee (*ibid.*).

Instances of actions the right to prosecute which passes to the trustee are actions for breaches of the following contracts:—to deliver goods (*Wright*

SUB-SECT. 7. Actions and Proceedings by and against Trustee.

cause of action arises from the bodily or mental suffering or personal inconvenience of the bankrupt, or from injury to his person or reputation, then the right of action remains with the bankrupt (*n*).

Transactions involving damage to person and property.

Where two separate and distinct causes of action arise from one transaction resulting both in substantial damage to the bankrupt's property and in injury to the bankrupt personally, the trustee is entitled to the right of action for damage to the property, and the bankrupt retains his right to sue for the personal injury (*o*); but where there is but one cause of action resulting in direct loss to the property, and the bankrupt's personal injury is only incidental thereto, the right of action may not be split, but passes to the trustee (*p*), unless it gives rise to the possible award by a jury of vindictive damages to the bankrupt, in which case the cause of action remains with him (*q*).

Personal services.

237. Where the personal skill and labour of the bankrupt are the basis of a contract, the right of action for breach of the contract passes to the trustee where the breach has occurred before bankruptcy, and money is recoverable by the bankrupt as damages for the breach, or where the bankrupt has completed the contract during

v. *Fairfield* (1831), 2 B. & Ad. 727; *Stanton* v. *Collier* (1854), 23 L. J. (Q. B.) 116); to repair (*Gibbon* v. *Dudgeon* (1881), 45 J. P. 748); to indemnify (*Re Perkins*, [1898] 2 Ch. 182); to provide funds to meet a bill of exchange (*Hill* v. *Smith* (1844), 12 M. & W. 618); to pay debts on the sale of a business (*Ashdown* v. *Ingamells* (1880), 5 Ex. D. 280); actions for money earned by a bankrupt other than "personal earnings," *e.g.*, commission (*Re Byrne, Ex parte Henry* (1892), 9 Morr. 213), architect's remuneration (*Emden* v. *Carte* (1881), 17 Ch. D. 169), for earnings in excess of what is necessary for the maintenance of the bankrupt and his family (*Mercer* v. *Vans Colina* (1898), 67 L. J. (Q. B.) 424); for the return of premiums paid on a policy of insurance (*Castelli* v. *Boddington* (1852), 1 E. & B. 66); wrongful dismissal (*Beckham* v. *Drake* (1849), 2 H. L. Cas. 579); trespass or negligence causing injury to the bankrupt's property (*Wetherell* v. *Julius* (1850), 10 C. B. 267, *Morgan* v. *Steble* (1872), L. R. 7 Q. B. 611), or involving the bankrupt in pecuniary liability (*Porter* v. *Vorley* (1832). 9 Bing. 93); maintenance (*Metropolitan Bank* v. *Pooley* (1885), 10 App. Cas. 210); false representation (*Hodgson* v. *Sidney* (1866), L. R. 1 Exch. 313); fraud (*Motion* v. *Moojen* (1872), L. R. 14 Eq. 202); for relief against a usurious bargain (*Payne* v. *Dicker* (1871), 24 L. T. 492 and, on appeal, 893) or against forfeiture (*Howard* v. *Fanshawe*, [1895] 2 Ch. 581); for a declaration that an absolute conveyance should stand only as a security (*Seear* v. *Lawson* (1880), 15 Ch. D. 426); and for re-opening accounts of the sales of goods and the recovery of sums found to be due on such accounts (*Guy* v. *Churchill* (1888), 40 Ch. D. 481).

(*n*) *Howard* v. *Crowther* (1841), 8 M. & W. 601; under former Bankruptcy Acts an action for seduction did not pass to the assignees in bankruptcy (*Beckham* v. *Drake*, *supra*, at p. 597). Where damages by trespass result in only a nominal loss to property the cause of action does not pass (*Rose* v. *Buckett*, [1901] 2 K. B. 449, at pp. 455, 456, and see cases there cited). See also cases cited in note (*m*), p. 137, *ante*.

(*o*) *Boddington* v. *Castelli* (1854), 23 L. J. (Q. B.) 31.

(*p*) *Stanton* v. *Collier* (1854), 23 L. J. (Q. B.) 116; *Hodgson* v. *Sidney* (1866), L. R. 1 Exch. 313, 316; *Morgan* v. *Steble* (1872), L. R. 7 Q. B. 611; and see *Beckham* v. *Drake*, *supra*, at p. 629; *Rogers* v. *Spence* (1846), 12 Cl. & F. 700, at p. 720; and *Rose* v. *Buckett*, *supra*, at p. 455, where the question of what happens when one and the same cause of action gives rise to substantial damage to property and injury to the person was left undecided.

(*q*) Compare *Brewer* v. *Dew* (1843), 11 M. & W. 625; *Howard* v. *Crowther*, *supra*; and *Rose* v. *Buckett*, *supra*, at p. 456.

bankruptcy, and money on the contract has become due (*r*). Otherwise the right to sue for money recoverable as damages for a breach of the contract occurring after the bankruptcy may be exercised by the bankrupt, and he can retain the amount recovered so far as it is required for the maintenance of himself and his family (*s*). But if the money is not so required the right of action passes to the trustee, unless he elects not to interfere with an action by the bankrupt (*t*).

So far as the proceeds of such an action are not required for the maintenance of the bankrupt and his family, the trustee may intercept them for the benefit of the creditors, or he may do so in any case where the bankrupt accumulates or invests such proceeds (*t*).

Personal torts.

Similarly in cases of personal tort the trustee cannot intercept or recover the damages from the bankrupt so far as they are applied to the maintenance of himself and his family (*a*).

Trade or business.

238. The right of action passes to the trustee where the personal labour and skill of the bankrupt are exercised in the way of a trade or business (*b*). But if the trustee does not intervene the bankrupt may sue for remuneration for services rendered by him (*c*).

The trustee's right of intervention applies to an action for wrongful dismissal (*d*) and for breach of a contract of employment (*e*), and he may intercept the proceeds of an action after the order of discharge, if the action had previously vested in him (*f*).

After-acquired property.

In the case of after-acquired property of an undischarged bankrupt, if he has had *bonâ fide* dealings with a third party previous to the intervention of the trustee, they hold good as between the trustee and the third party (*g*) save as regards title to real estate (*h*); and the bankrupt may sue for rent due (*i*) or for a partnership account (*k*).

When bankrupt's action frivolous.

239. Where the right of action has passed to the trustee, and the bankrupt brings his action also, it may be dismissed as frivolous and vexatious (*l*).

(*r*) *Drake* v. *Beckham* (1843), 11 M. & W. 315. Such action relates directly to the estate, and passes to the trustee (*Whitmore* v. *Gilmour* (1844), 12 M. & W. 808).

(*s*) *Beckham* v. *Drake* (1849), 2 H. L. Cas. 579; *Bailey* v. *Thurston & Co., Ltd.*, [1903] 1 K. B. 137, *per* COLLINS, M.R., at p. 141; *Re Roberts*, [1900] 1 Q. B. 122; *Jackson* v. *Swarbrick*, [1870] W. N. 133.

(*t*) *Re Roberts, supra.*

(*a*) *Ex parte Graham, Re Job* (1870), 21 L. T. 802; *Ex parte Vine, Re Wilson* (1878), 8 Ch. D. 364.

(*b*) *Emden* v. *Carte* (1881), 17 Ch. D. 169, and, on appeal, 768; *Re Rogers, Ex parte Collins*, [1894] 1 Q. B. 425; *Elliot* v. *Clayton* (1851), 20 L. J. (Q. B.) 217.

(*c*) *Jameson* v. *Brick and Stone Co., Ltd.* (1878), 4 Q. B. D. 208; *Herbert* v. *Sayer* (1844), 5 Q. B. 965; *Bailey* v. *Thurston & Co., Ltd.*, [1903] 1 K. B. 137.

(*d*) *Emden* v. *Carte, supra; Bailey* v. *Thurston & Co., Ltd., supra*, at p. 142.

(*e*) *Wadling* v. *Oliphant* (1875), 1 Q. B. D. 145; *Bailey* v. *Thurston & Co., Ltd., supra.*

(*f*) *Re Byrne, Ex parte Henry* (1892), 9 Morr. 213.

(*g*) *Cohen* v. *Mitchell* (1890), 25 Q. B. D. 269; *Buchan* v. *Hill*, [1888] W. N. 233.

(*h*) *Re New Land Development Association and Gray*, [1892] 2 Ch. 138; *Re Clayton and Barclay*, [1895] 2 Ch. 212.

(*i*) *Cook* v. *Whellock* (1890), 24 Q. B. D. 658.

(*k*) *Buchan* v. *Hill, supra.*

(*l*) *Metropolitan Bank* v. *Pooley* (1885), 10 App. Cas. 210; R. S. C., Ord. 25,

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SECT. 10.—*Property available for Distribution amongst Creditors.*

SUB-SECT. 1.—*Discovery of Property.*

Full disclosure of property.

240. The Bankruptcy Acts and Rules provide very elaborate and effective machinery for discovering the property of a bankrupt.

The bankrupt is bound to make full disclosure of his property to the bankruptcy court and its officers, and if he fails to make such disclosure he may be punished for contempt of court, and if he wilfully conceals property, he is also liable to prosecution under the Debtors Act, 1869 (*m*).

Statement of affairs.

Immediately after a receiving order is made against a debtor he is bound to make out and submit to the official receiver a statement of his affairs, which should enumerate all his assets as well as his liabilities (*n*), and to attend a public examination (*o*).

Private examination of debtor and others.

241. In addition to the public examination of the debtor the court has power, on the application of the official receiver or trustee, at any time after a receiving order has been made against a debtor, to summon before it the debtor or his wife, or any person known or suspected to have in his possession any of the estate or effects belonging to the debtor, or supposed to be indebted to the debtor, or any person whom it may deem capable of giving information respecting the debtor, his dealings or property. The court may require any such person to produce any documents in his custody or power relating to the debtor, his dealings or property. If any person so summoned refuses without lawful excuse to come at the appointed time, he may be apprehended and brought up for examination. The court may examine on oath, either by word of mouth or written interrogatories, any person so brought before it concerning the debtor, his dealings or property.

Order for payment or delivery of property.

Where any person on such examination admits that he is indebted to the debtor, the court may, on the application of the official receiver or trustee, order him to pay to the receiver or trustee, at such time and in such manner as to the court seems expedient, the amount admitted or any part thereof, either in full discharge of the whole amount in question or not, as the court thinks fit, with or without costs of the examination; and where any person on such examination admits that he has in his possession any property belonging to the debtor, the court may, on the application of the official receiver or trustee, order him to deliver to the official receiver or trustee such property or any part thereof at such time, and in such manner, and on such terms as to the court may seem just (*p*).

r. 4; and *Kellaway* v. *Bury* (1892), 66 L. T. 599, *per* LINDLEY, L.J., at p. 602: "That is a very strong power, and should only be exercised in cases which are clear and beyond all doubt. The court must see that the plaintiff has got no case at all."

(*m*) See p. 74, *ante*, and p. 345, *post*.

(*n*) See p. 70, *ante*.

(*o*) See p. 71, *ante*.

(*p*) Bankruptcy Act, 1883 (46 & 47 Vict. c. 52), s. 27. As to an application

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242. An order for such an examination can be obtained on the application of a creditor as well as of the official receiver or trustee, but not in general on the application of the bankrupt or a person to whom he has assigned his surplus (*q*).

Application for order for examination.

The examination is in practice held in private before the registrar of the court (*r*), and, if the witness examined is someone other than the debtor, the debtor has no right to be present (*s*). If the debtor is examined, he is entitled to have the professional assistance of solicitor and counsel (*t*); so is any other witness, if the examination is a step in litigation hostile to the witness (*a*); the practice is to allow such assistance to all witnesses at such an examination. If a solicitor or counsel appears at such an examination for a witness, he is not entitled to take away notes of the examination, and may be required not to disclose without leave information obtained at the examination (*b*).

Professional assistance for witness.

Expenses.

A person summoned as a witness in this way is only entitled to conduct money and payment for his expenses and loss of time (*c*); he is not entitled to the costs of employing solicitor and counsel, except when he is examined with a view of proceedings being taken against him and not merely for the purpose of obtaining information from him; in such a case the court has power to order the person who procured the examination to pay the costs incurred by the person examined in employing solicitor and counsel, if the proceedings fail (*d*).

for an order under this section, see Bankruptcy Rules, r. 78. As to privilege of Parliament, see *Re Armstrong, Ex parte Lindsay*, [1892] 1 Q. B. 327.

(*q*) *Re Whicher, Ex parte Stevens* (1888), 5 Morr. 173; *Ex parte Sheffield, Re Austin* (1879), 10 Ch. D. 434. In one case, where the circumstances were peculiar, such an order was made on the application of the bankrupt for the examination of a creditor (*Ex parte Austin, Re Austin* (1876), 4 Ch. D. 13).

(*r*) The court may order that any person who, if in England, would be liable to be brought before it, shall be examined in Scotland or Ireland, or any place out of England within the British dominions (Bankruptcy Act, 1883 (46 & 47 Vict. c. 52), ss. 27 (6), 117—119; *Re Drucker* (No. 2), *Ex parte Basden*, [1902] 2 K. B. 210). If a person who has been summoned is unable through illness to attend the court, his examination may be ordered to be held at his own residence before an officer of the court (*Re Bradbrook, Ex parte Hawkins* (1889), 23 Q. B. D. 226; Bankruptcy Rules, r. 66).

(*s*) *Re Beall, Ex parte Beall*, [1894] 2 Q. B. 135. A creditor has no right to be present (*Re Norwich Equitable Fire Insurance Co.* (1884), 27 Ch. D. 515).

(*t*) *Re Greys Brewery Co.* (1883), 25 Ch. D. 400, 405.

(*a*) *Ex parte Kemp, Re Sir W. Russell* (1873), 42 L. J. (BCY.) 26, at p. 28; *Ex parte Waddell, Re Lutscher* (1877), 6 Ch. D. 328.

(*b*) *Re Greys Brewery Co., supra*, at p. 405; *Re London and Northern Bank, Ltd., Haddock's Case*, [1902] 2 Ch. 73. The transcript of the shorthand writer's note of the proceedings at the examination is a document privileged from production, although it must ultimately be filed (*Learoyd* v. *Halifax Joint Stock Banking Co.*, [1893] 1 Ch. 686, 693; *Re Beall, Ex parte Beall*, [1894] 2 Q. B. 135).

(*c*) *Ex parte Waddell, Re Lutscher* (1877), 6 Ch. D. 328; Bankruptcy Rules, r. 71. *Quære* whether, if the debtor is summoned, he is entitled to anything. See *ibid.*, r. 71. A person who has been summoned, and does not attend, cannot be committed under the Bankruptcy Act, 1883 (46 & 47 Vict. c. 52), s. 27, unless a reasonable sum is tendered to him to cover the cost of coming to court and his expenses (*Re Batson, Ex parte Hastie* (1894), 70 L. T. 382).

(*d*) *Re Appleton, French & Scrafton, Ltd.*, [1905] 1 Ch. 749, 756.

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243. Examination of a witness for an indirect purpose not connected with the bankruptcy, *e.g.*, to obtain evidence for use in an action, will not be allowed (*e*).

Scope of examination. Incriminating answers.

A mere witness summoned for examination is entitled to refuse to answer a question on the ground that his answer would tend to criminate him (*f*), but if the debtor is examined, he cannot refuse to answer on that ground (*g*). Statements made by a debtor when examined under this provision will be admissible in evidence against him except in any proceeding in respect of the offences set forth in s. 1 of the Larceny Act, 1901 (*h*), and ss. 77—84 of the Larceny Act, 1861 (*i*).

Solicitor's privilege.

Matters which have been communicated to a solicitor for the purpose of obtaining professional advice and assistance are privileged, and a solicitor, if he is being examined, cannot be asked as to such matters, but he can be asked as to matters not communicated in professional confidence (*j*).

The court has no jurisdiction to order a witness summoned for examination to furnish an account in writing not on oath (*k*).

Conduct of examination.

244. When a person is examined, the registrar should be present during the whole of the examination (*l*), and should exercise some control over the person conducting the examination and stop irrelevant questions (*m*). The position of a witness examined in this way is not that of a witness called by a litigant party in order that he may be examined by the two litigant parties before the court; he is the witness of the court, and although, by a common and convenient practice, the counsel or other representative of the official receiver or trustee puts the questions, the conduct of the examination rests with the registrar or other officer before whom it is held so far as may be necessary. An examination at a private sitting may go as far as the court may consider necessary in order to bring out the real facts which may be the subject of inquiry, so far as the witness is capable of giving the information (*n*). A witness examined in this way must answer questions which refer to mere hearsay (*o*), and questions which do not relate directly to the bankrupt's property (*p*), so long as the

(*e*) *Re Franks, Ex parte Gittins*, [1892] 1 Q. B. 646; *Re Desportes* (1893), 10 Morr. 40; *Re Easton, Ex parte Davies* (1891), 8 Morr. 168; *Re Saunders, Ex parte Leigh* (1896), 13 T. L. R. 108.

(*f*) *Ex parte Schofield, Re Firth* (1877), 6 Ch. D. 230. See *Re Genese, Ex parte Gilbert* (1886), 3 Morr. 223; *Ex parte Reynolds* (1882), 20 Ch. D. 294.

(*g*) *Ex parte Schofield, supra*, and see p. 73, *ante*.

(*h*) 1 Edw. 7, c. 10.

(*i*) 24 & 25 Vict. c. 96; Bankruptcy Act, 1890 (53 & 54 Vict. c. 71), s. 27 (2).

(*j*) *Re Arnott, Ex parte Chief Official Receiver* (1888), 5 Morr. 286; *Re Wells, Ex parte the Trustee* (1892), 9 Morr. 116; *Ex parte Campbell, Re Cathcart* (1870), 5 Ch. App. 703.

(*k*) *Ex parte Reynolds, Re Reynolds* (1882), 21 Ch. D. 601.

(*l*) *R.* v. *Lloyd* (1887), 19 Q. B. D. 213.

(*m*) *Re Pennington, Ex parte Pennington* (1888), 5 Morr. 268.

(*n*) *Re Scharrer, Ex parte Tilly* (1888), 20 Q. B. D. 518, *per* FRY, L.J., at p. 522.

(*o*) *Re Ottoman Co., Ltd.* (1867), 15 W. R. 1069.

(*p*) *Ex parte Vogel* (1818), 2 B. & Ald. 219, but see note (*s*), p. 143, *post*.

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questions relate to matters which may be useful to the court in the conduct of the bankruptcy proceedings or are for the sake of getting information to see what course ought to be followed by the official receiver or trustee with reference to some matter or claim in the bankruptcy (*q*).

Production of documents.

245. With reference to the production of documents by a witness under examination other than the bankrupt, the court has a discretion (*r*), and an order for production will not be made unless the court has evidence that the document relates to the property or dealings of the bankrupt (*s*). A mortgagee may be ordered to produce the mortgage deed relating to property mortgaged by the bankrupt (*t*). But a witness who is a mere servant and has no authority from his master to produce documents, and who refuses to produce them, cannot be ordered to produce them (*a*), unless his master has gone away and the documents are in the sole possession of the witness (*b*). A solicitor, however, who has a lien on documents of the bankrupt in respect of professional services rendered before the bankruptcy, is not on that account entitled to refuse to produce documents for examination by the trustee (*c*). An order for discovery will not be made when it is sought for some indirect purpose (*d*).

SUB-SECT. 2.—*Available Property in General.*

Object of bankruptcy law.

246. The object of the bankruptcy law is that every beneficial interest which a bankrupt has, everything belonging to him which can pass from him to his trustee and which can be turned to profit, should be divisible amongst his creditors (*e*).

Property which does not vest in trustee.

Accordingly the property of a person who is adjudicated a bankrupt passes away from him on the adjudication, and becomes divisible among his creditors, and is vested in the trustee of his property (*f*), with the exception of property held by him in trust for any other person (*g*), and the tools of his trade and the necessary wearing apparel and bedding of himself, his wife and his children

(*q*) See *Learoyd* v. *Halifax Joint Stock Banking Co.*, [1893] 1 Ch. 686, 692, 693.

(*r*) *Re Joseph Hargreaves, Ltd.*, [1900] 1 Ch. 347.

(*s*) *Ex parte Smith, Re Bevan & Co.* (1881), 45 L. T. 447; *Re Saunders, Ex parte Leigh* (1896), 13 T. L. R. 108.

(*t*) *Ex parte Caldecott, Re White* (1830), Mont. 55; *Re Marks' Trust Deed* (1866), 1 Ch. App. 429; *Ex parte Tatton, Re Thorp* (1881), 17 Ch. D. 512.

(*a*) *Re Leighton and Benett* (1866), 1 Ch. App. 331; *Re Higgs, Ex parte Leicester* (1892), 66 L. T. 296.

(*b*) *Re Leighton and Benett, supra.*

(*c*) *Re Toleman and England, Ex parte Bramble* (1880), 13 Ch. D. 885.

(*d*) *Re Dashwood, Ex parte Kirk* (1886), 3 Morr. 257; *Re Palmer, Ex parte Palmer* (1886), 3 Morr. 267.

(*e*) See *Smith* v. *Coffin* (1795), 2 Hy. Bl. 444, at p. 461; *Gibson* v. *Carruthers* (1841), 8 M. & W. 321, at p. 333.

(*f*) Bankruptcy Act, 1883 (46 & 47 Vict. c. 52), ss. 20 (1), 54. The official receiver is trustee if no trustee is appointed by the creditors and certified by the Board of Trade.

(*g*) See p. 168, *post.*

SUB-SECT. 2. Available Property in General.

to a value, inclusive of tools and apparel and bedding (*h*), not exceeding £20 in the whole (*i*).

Property divisible amongst creditors.

247. The property which is divisible among the bankrupt's creditors includes (1) all property which belongs to or is vested in him at the commencement of the bankruptcy, or which is acquired by or devolves on him before his discharge (*k*); (2) the capacity to exercise and to take proceedings for exercising all such powers in over or in respect of property as might have been exercised by the bankrupt for his own benefit at the commencement of his bankruptcy or before his discharge, except the right of nomination to a vacant ecclesiastical benefice (*l*); (3) all goods being at the commencement of the bankruptcy in the possession, order, or disposition of the bankrupt in his trade or business by the consent and permission of the true owner under such circumstances that the bankrupt is the reputed owner thereof; the word "goods" does not here include things in action other than debts due or growing due to the bankrupt in the course of his trade or business (*m*).

Expectancies.

248. A mere expectancy or possibility of an interest is not property, and if it remains a possibility or expectancy while the bankruptcy lasts, it does not become divisible among the creditors; but if it becomes an actual interest during the bankruptcy, it is divisible among the creditors (*n*).

(*h*) "Bedding" includes a bedstead (see *Davis* v. *Harris* (1900), 69 L. J. (Q. B.) 232), under the analogous provisions of the County Courts Act, 1888 (51 & 52 Vict. c. 43), s. 147. If tools or apparel or bedding over the value of £5 are sold by the sheriff under an execution (see the Small Debts Act, 1845 (8 & 9 Vict. c. 127, s. 8)), the trustee may be entitled to the proceeds of the sale, even though they do not exceed £20 in the whole (*Re Dawson, Ex parte Dawson*, [1899] 2 Q. B. 54).

(*i*) Bankruptcy Act, 1883 (46 & 47 Vict. c. 52), s. 44, and see s. 168 (1), as to the meaning of "property."

(*k*) See pp. 152, 164, *post*.

(*l*) See p. 145, *post*.

(*m*) Bankruptcy Act, 1883 (46 & 47 Vict. c. 52), s. 44.

(*n*) *Johnson* v. *Smiley* (1853), 17 Beav. 223, 230; *Re Inkson's Trusts* (1855), 21 Beav. 310; *Re Duggan's Trusts* (1869), L. R. 8 Eq. 697. A mere possibility or expectancy such as that of an heir-apparent or heir-presumptive or next of kin does not pass to the trustee (*Carleton* v. *Leighton* (1805), 3 Mer. 667; *Re Parsons* (1890), 45 Ch. D. 51, disapproving *Re Beaupré's Trusts* (1888), 21 L. R. Ir. 397). The contingency that a husband may become tenant by the curtesy of his wife's real estate, which has not yet fallen into possession, is such a possibility, and does not pass to his trustee in bankruptcy, if the wife's real estate does not fall into possession during the husband's bankruptcy (*Gibbins* v. *Eyden* (1869), L. R. 7 Eq. 371). The possibility that a pecuniary benefit may accrue to the bankrupt by another person exercising in his favour an option which is only exercisable on a contingency, does not pass on bankruptcy (*Ex parte Dever, Re Suse and Sibeth* (1887), 18 Q. B. D. 660). An option which a bankrupt may exercise does pass (*ibid.*, at p. 668, *per* BOWEN, L.J.; see *Buckland* v. *Papillon* (1866), 36 L. J. (CH.) 81). If property is limited in trust for the members of a named class (*e.g.*, the children of A. and B.) as another person shall appoint, and in default of appointment to all the members of the class, and one of the members of the class becomes bankrupt before any appointment is made, his interest is a mere possibility, and does not pass on bankruptcy (*Re Vizard* (1866), 1 Ch. App. 588); if in a limitation of this kind an appointment is made by will, no

A possibility coupled with an interest passes on bankruptcy (*o*).

Genèral powers of appointment.

249. A general power of appointment over property is not strictly speaking, "property," but as regards men and unmarried women it is brought within the meaning of that word by s. 44 of the Bankruptcy Act, 1883, as being within "the capacity to exercise and to take proceedings for exercising all such powers in or over or in respect of property as might have been exercised by the bankrupt for his own benefit at the commencement of the bankruptcy or before his discharge"; such a power, if exercisable by deed, can be exercised by the trustee for the benefit of the creditors so long as the bankrupt is living (*p*).

member of the class has any property in the appointed share till the appointor's death, and, if one of the members of the class becomes bankrupt and gets his discharge before the appointor's death, no interest passes to his creditors, except when the object of the appointment is only to fix the proportion which each member of the class should take (*Duke of Marlborough* v. *Lord Godolphin* (1750), 2 Ves. Sen. 61).

(*o*) Thus where property is settled in trust for a tenant for life, and on his death to be divided among such of his children as should be living at his death, and one of the children becomes bankrupt before the death of the tenant for life, his interest in remainder passes on bankruptcy (*Higden* v. *Williamson* (1731), 3 P. Wms. 132). The incipient and defeasible right which a husband had under the law before the Married Women's Property Act, 1882 (45 & 46 Vict. c. 75), to his wife's choses in action was a right that passed on bankruptcy to his creditors (*Ripley* v. *Woods* (1828), 2 Sim. 165; *Pierce* v. *Thornely* (1828), *ibid.*, 167); this would still be the case as regards persons married before January 1, 1883, when the wife's title to the choses in action first accrued before that date (see Married Women's Property Act, 1882, s. 5; *Reid* v. *Reid* (1886), 31 Ch. D. 402; *Re Cuno* (1889), 43 Ch. D. 12; *Re Parsons* (1890), 45 Ch. D. 51). If an income for life is given to a person then bankrupt to be paid to him on his obtaining his discharge, this is a contingent interest which vests in the trustee in bankruptcy, and on the bankrupt obtaining his discharge vests in the trustee absolutely (*Davidson* v. *Chalmers*, *Perry* v. *Chalmers* (1864), 33 L. J. (CH.) 622).

(*p*) *Ex parte Gilchrist*, *Re Armstrong* (1886), 17 Q. B. D. 521, at pp. 527, 529, 531; *Nichols to Nixey* (1885), 29 Ch. D. 1005. A general power of appointment exercisable by will only would not be property within s. 44 of the Bankruptcy Act, 1883 (46 & 47 Vict. c. 52), and could not, it seems, pass to the trustee (see Sugden on Powers, 8th ed. 188; *Re Guedalla*, [1905] 2 Ch. 331). By an appointment under such a power the appointee becomes a trustee for all who are creditors of the appointor at the time of his death (*Jenny* v. *Andrews* (1822), 6 Madd. 264).

If a person who has an estate defeasible by appointment by himself becomes bankrupt, he cannot exercise the power so as to deprive his trustee in bankruptcy of the estate which has already vested in the trustee (*Hole* v. *Escott* (1838), 4 My. & Cr. 187; *Doe* v. *Britain* (1818), 2 B. & Ald. 93; *Badham* v. *Mee* (1831), 7 Bing. 695; *Badham* v. *Mee* (1832), 1 My. & K. 32; *Re Cooper* (1884), 27 Ch. D. 565, at p. 569). If the estate is defeasible by an appointment by a third person, it seems that the estate of the trustee may be defeated by an appointment; thus in *Lee* v. *Olding* (1856), 25 L. J. (CH.) 580, where the bankrupt had a vested but defeasible interest in a moiety of a fund in default of appointment by another person, the defeasible interest passed to the creditors of the bankrupt, but was held to be validly defeated by an appointment of the whole of the fund to the bankrupt after he had obtained his discharge. See *Re Vizard* (1866), 1 Ch. App. 588.

It has been held by FARWELL, J., that a capacity of releasing a limited power of appointment does not pass to the trustee in bankruptcy of the donee of the power, but the point has been left undecided by the Court of Appeal in *Re Rose*, [1904] 2 Ch. 348, on appeal [1905] 1 Ch. 94.

A power in a settlement to renew leases does not pass to the trustee of the donee of the power on bankruptcy, but the power can only be exercised with

SUB-SECT. 2. Available Property in General.

Married women.

But such a power is not separate property within the meaning of the Married Women's Property Act, 1882 (*a*), and, as a married woman is only subject to the bankruptcy laws by virtue of that Act and only so far as her separate property is concerned, if a married woman who is the grantee of such a power becomes bankrupt, the capacity to exercise the power does not pass to the trustee, and the married woman cannot be compelled to exercise the power in favour of her creditors (*b*).

Interests determinable on bankruptcy.

250. An interest in property determinable and passing away to another person on the bankruptcy of the possessor does not become divisible among the bankrupt's creditors, if the settlor or person creating the interest is someone other than the bankrupt (*c*). The rule is that the owner of property may on alienation qualify the interest of his alienee by a condition to take effect on the bankruptcy of the alienee, but cannot by contract or otherwise qualify his own interest by a like condition, determining or controlling it in the event of his own bankruptcy to the disappointment or delay of his creditors (*d*). Where property is granted to trustees in trust for a married woman for her separate use with a restraint on anticipation, her beneficial interest will not on her bankruptcy be divisible among her creditors, so long as she remains married (*e*); and, by the use of

the concurrence of the trustee (*Simpson* v. *Bathurst* (1869), 5 Ch. App. 193); so with a power of consenting to an advancement in favour of a child (*Re Cooper* (1884), 27 Ch. D. 565), and a power of consenting to the sale of property (*Re Bedingfield and Herring*, [1893] 2 Ch. 332); in the case of any such power which does not pass to the trustee in bankruptcy, if the exercise of the power would affect the interest of the trustee, his consent is necessary (*Re Cooper*, *supra*); if the interest of the trustee would not be affected, *e.g.*, in the case of a power to appoint new trustees of a settlement etc., the consent of the trustee in bankruptcy is not necessary (see *Hardaker* v. *Moorhouse* (1884), 26 Ch. D. 417).

The power which a tenant for life has under the Settled Land Act, 1882 (45 & 46 Vict. c. 38), of consenting to certain sales and dispositions of property is not suspended by his bankruptcy (Settled Land Act, 1882, s. 50; *Re Mansel*, [1884] W. N. 209; *Re Marquis of Ailesbury's Settled Estates*, [1892] 1 Ch. 506, at p. 535), and, *semble*, such a power can be exercised without the consent of the trustee in bankruptcy (Hood and Challis, Conveyancing, Settled Land and Trustee Acts, 6th ed. 292; Wace on Bankruptcy, 216). The protector of a settlement who becomes bankrupt remains protector after bankruptcy (Fines and Recoveries Act, 1833 (3 & 4 Will. 4, c. 74), s. 22). As to the exercise of a power of appointment by a bankrupt after his bankruptcy, see *Jones* v. *Winwood* (1841), 10 Sim. 150; *Haswell* v. *Haswell* (1860), 2 De G. F. & J. 456; *Wickham* v. *King* (1864), 2 H. & M. 436; *Aylwin's Trusts* (1873), L. R. 16 Eq. 585. The right of a husband to administer to his wife's estate is not a right which passes to the husband's trustee in bankruptcy (*In the goods of Turner* (1886), 12 P. D. 18).

(*a*) 45 & 46 Vict. c. 75.

(*b*) *Ibid.*, s. 1 (5); *Ex parte Gilchrist, Re Armstrong* (1886), 17 Q. B. D. 521.

(*c*) *Re Ashby, Ex parte Wreford*, [1892] 1 Q. B. 872; *Roe* v. *Galliers* (1787), 2 Term Rep. 133. As to the construction of clauses providing for determination of an interest on bankruptcy or insolvency, see *Re Muggeridge* (1860), John. 625; *Freeman* v. *Bowen* (1865), 35 Beav. 17; *Montefiore* v. *Enthoven* (1867), L. R. 5 Eq. 35; *Billson* v. *Crofts* (1873), L. R. 15 Eq. 314; *Ex parte Gould, Re Walker* (1884), 13 Q. B. D. 454; *Nixon* v. *Verry* (1885), 29 Ch. D. 196; *Re Carew*, [1896] 2 Ch. 311; *Re Weibking, Ex parte Ward*, [1902] 1 K. B. 713.

(*d*) *Mackintosh* v. *Pogose*, [1895] 1 Ch. 505, at pp. 511—514.

(*e*) See *Birmingham Excelsior Money Society* v. *Lane*, [1904] 1 K. B. 35; *Re Wheeler*, [1899] 2 Ch. 717. But a settlement, or agreement for a settlement, of

apt words of limitation, where property is granted by one person to another in such a way that the interest granted determines on the bankruptcy of the grantee and passes away to someone else, such property is not divisible among the grantee's creditors on his bankruptcy (*f*). But the instrument creating the interest must use proper words of limitation to ensure that it does pass away from him in the event of his bankruptcy, otherwise his interest, whatever it may be, will be divisible among his creditors (*g*).

Gift over on alienation etc.

Even where the event of bankruptcy is not specifically referred to, a gift over of a life estate in the event of the grantee alienating or charging his interest may be so expressed as to operate as a forfeiture in case of bankruptcy (*h*).

a woman's own property has no validity against debts contracted by her before marriage, and no settlement, or agreement for a settlement, of her own property by a married woman has any greater force or validity against her creditors than a like settlement or agreement made by a man would have against his creditors (Married Women's Property Act, 1882 (45 & 46 Vict. c. 75), s. 19). If a married woman becomes bankrupt, all her separate estate not subject to a restraint on anticipation is divisible among creditors (*Re Armstrong, Ex parte Boyd* (1888), 21 Q. B. D. 264), and so much of her separate estate subject to a restraint on anticipation as consists of property settled by herself, where the settlement is one which, if made by a man, would be liable to be set aside (see *Re Lane-Fox, Ex parte Gimblett*, [1900] 2 Q. B. 508). Other separate estate with a restraint on anticipation vests in the trustee in bankruptcy, but subject to the restraint, which is removed on the death of her husband (*Re Wheeler*, [1899] 2 Ch. 717).

(*f*) *Rochford* v. *Hackman* (1852), 9 Hare, 475. But property cannot be given to a man in such a way that it should go to him, when and as soon as he should be able to enjoy it for his own use and benefit, so as not to be subject to his debts (*Davidson* v. *Chalmers*, *Perry* v. *Chalmers* (1864), 33 L. J. (CH.) 622).

(*g*) *Brandon* v. *Robinson and Davies* (1811), 1 Rose, 197, where a testator gave a fund to trustees on trust to pay the dividends into his son's hands, or to his order or receipt, to the intent that the same or any part thereof should not be grantable or assignable by way of anticipation, but there was no gift over, and it was held that on the son's bankruptcy his interest passed to his creditors; *Graves* v. *Dolphin* (1826), 1 Sim. 66, where an annuity, given to a person for his personal maintenance and support, which was not to be liable to his debts and was to be paid into his own hands and not to any other person, but in respect of which there was no gift over, was held not to be determinable on bankruptcy and passed to the annuitant's creditors. In *Bird* v. *Johnson* (1854), 18 Jur. 976, which was a gift of an absolute interest, there was a proviso that in the event of the grantee becoming bankrupt before his interest should become payable to him, so as to deprive him of the interest intended to be vested in or payable to him, it should cease and determine as if he were then dead, and it was held that, there being no sufficient limitation over and the condition being repugnant and void, there was no forfeiture on bankruptcy, though there would have been if the interest given had been for life alone.

(*h*) *Cooper* v. *Wyatt* (1821), 5 Madd. 482; *Dommett* v. *Bedford* (1796), 3 Ves. 149; *Shee* v. *Hale* (1807), 13 Ves. 404; *Rochford* v. *Hackman* (1852), 9 Hare, 275; *Re Amherst* (1872), L. R. 13 Eq. 464; *Re Parnham* (1872), L. R. 13 Eq. 413; *Ex parte Eyston, Re Throckmorton* (1877), 7 Ch. D. 145; *Metcalfe* v. *Metcalfe*, [1891] 3 Ch. 1; *Re Sartoris*, [1892] 1 Ch. 11; *Re Loftus-Otway*, [1895] 2 Ch. 235; *Re Cotgrave*, [1903] 2 Ch. 705.

But in some cases where there were provisions for the forfeiture of a life estate or income in the event of the tenant for life alienating or charging his interest, it has been decided that there was no forfeiture on bankruptcy. Thus, in *Lear* v. *Leggett* (1830), 1 Russ. & M. 690, where the proviso was that the life estate should not be subject to any alienation or disposition by sale, mortgage or otherwise, and if the tenant for life should charge or attempt to charge his interest, any such mortgage, sale or other disposition should be a forfeiture, it was held that the proviso did not apply to the case

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Construction of forfeiture clauses.

In the construction of wills and settlements providing for the determination of a grantee's interest in the event of his bankruptcy, the court, for the sake of giving effect to the testator's or settlor's intention that property should not pass into hands other than those which the testator or settlor intended, has construed the clauses creating the limitation over in the event of bankruptcy in such a way as to apply them to a bankruptcy already existing, either at the date of the will or the settlement or at the time when the grantee's interest would but for the bankruptcy have fallen into his possession (*i*). On the other hand, it appears to be well settled that, if a bankruptcy is annulled in the interval between the time when the title to a fund accrues to the bankrupt and the time when it would have become payable to him but for the bankruptcy, the bankrupt is in the same position as if he had never been bankrupt, and is entitled to receive the fund, if it has not been intercepted in the meantime (*k*).

Provisions for maintenance of bankrupt.

Settlements providing for the determination of life estates on bankruptcy often contain provisions enabling the trustees in whom the trust estate is vested to apply the income to the maintenance of the bankrupt or of his wife and family. Where any interest

of alienation by an involuntary act such as bankruptcy then was, and that the life estate was not forfeited on bankruptcy. In *Ex parte Dawes*, *Re Moon* (1886), 17 Q. B. D. 275, where a gift over was to take place if the grantee should assign, charge, or otherwise dispose of the income or should become bankrupt or do or suffer anything whereby the income if payable to him absolutely or any part thereof would become vested in any other person, it was held that the mere act of the filing of a bankruptcy petition by the grantee did not operate as a forfeiture; in that case no bankruptcy followed in fact, and the income would never have been "vested" in any other person, if the income had been payable to the grantee absolutely; the limitations differ from those in *Re Sartoris*, [1892] 1 Ch. 11, and *Re Loftus-Otway*, [1895] 2 Ch. 235 (compare *Re James* (1890), 62 L. T. 454). In *Re Harvey*, *Ex parte Pixley* (1889), 6 Morr. 95, a gift over of an annuity in the event of the annuitant alienating, charging, incumbering, or disposing of it, was held not to apply to the case of the annuitant being adjudicated bankrupt on a creditor's petition. This case seems inconsistent with *Rochford* v. *Hackman* and *Re Amherst* (see note (*h*), p. 147, *ante*). If the person entitled to an interest in English personal estate determinable on bankruptcy is a domiciled Englishman and is made a bankrupt abroad, the foreign bankruptcy does not operate as a forfeiture of the determinable interest (*Re Hayward*, [1897] 1 Ch. 905). As to the effect of a foreign bankruptcy, see *Re Blithman* (1865-6), L. R. 2 Eq. 23; *Re Davidson* (1873), L. R. 15 Eq. 383; *Re Lawson*, [1896] 1 Ch. 175; *Re Aylwin* (1873), L. R. 16 Eq. 585; *Re Levy* (1885), 30 Ch. D. 119; *Re James* (1890), 62 L. T. 454; *Waite* v. *Bingley* (1882), 21 Ch. D. 674; *Re Artola Hermanos*, *Ex parte André Châle* (1890), 24 Q. B. D. 640. As to provisions for forfeiture of a lease on bankruptcy, see p. 149, *post*.

(*i*) *Manning* v. *Chambers* (1847), 1 De G. & Sm. 282; *Seymour* v. *Lucas* (1860), 1 Drew. & Sm. 177; *Trappes* v. *Meredith* (1871), 7 Ch. App. 248; *Re Akeroyd*, [1893] 3 Ch. 363.

(*k*) Thus, in *White* v. *Chitty* (1866), L. R. 1 Eq. 372; *Lloyd* v. *Lloyd* (1866), L. R. 2 Eq. 722; *Robins* v. *Rose* (1874), 43 L. J. (CH.) 334; *Re Parnham* (1876), 46 L. J. (CH.) 80; *Ancona* v. *Waddell* (1878), 10 Ch. D. 157, it was held that no forfeiture had taken place because the income had not been payable before the annulment of the bankruptcy. In *Sharp* v. *Cosserat* (1855), 20 Beav. 470; *Re Parnham* (1872), L. R. 13 Eq. 413; *Robertson* v. *Richardson* (1885), 30 Ch. D. 623; *Re Broughton* (1887), 57 L. T. 8; *Metcalfe* v. *Metcalfe*, [1891] 3 Ch. 1, it was held that a forfeiture had taken place because the income became payable before the annulment. But see *Samuel* v. *Samuel* (1879), 12 Ch. D. 152; *Re James* (1890), 62 L. T. 454.

at all remains in the bankrupt, that will pass to his creditors (*l*); but, if the trustees have an absolute discretion as to the application of the income, no interest passes to the creditors (*m*), unless the trustees of the settlement, in the exercise of their discretion, pay to the bankrupt more than is necessary for his mere support, when the trustee in bankruptcy will be able to insist on the bankrupt accounting to him for the excess (*n*).

Forfeiture of lease on bankruptcy.

251. A proviso in a lease of land that the lease should be forfeited on the lessee's bankruptcy is valid; and where there is such a proviso, no interest in the demised premises is divisible among the creditors, if the lessee becomes bankrupt (*o*). But a proviso of this kind only applies to the bankruptcy of the person who is in possession of the term created by the lease; if a lessee assigns his term and after the assignment becomes bankrupt, his bankruptcy does not operate to determine the lease (*p*).

Notice required.

If the term created by a lease is determinable on bankruptcy, the provisions as to forfeiture are, for a year from the date of the bankruptcy, subject to the conditions imposed by s. 14 of the Conveyancing and Law of Property Act, 1881 (*q*), and are only enforceable after service of a notice under that section (*r*).

Provision for forfeiture on assignment.

A proviso for forfeiture of a term in the event of the lessee assigning his interest without the assent of the lessor does not apply to

(*l*) *Kearsley* v. *Woodcock* (1843), 3 Hare, 185. If property is so settled that the income cannot be paid to anyone but the bankrupt, and there is no direction to accumulate, then the interest of the bankrupt passes to his trustee in bankruptcy, and in such a case a discretion to pay a larger or smaller amount to the bankrupt would, it seems, be determined by bankruptcy (*Green* v. *Spicer* (1830), 1 Russ. & M. 395; *Piercy* v. *Roberts* (1832), 1 My. & K. 4; *Snowdon* v. *Dales* (1834), 6 Sim. 524; *Younghusband* v. *Gisborne* (1844), 1 Coll. 400).

(*m*) *Holmes* v. *Penney* (1856), 3 K. & J. 90; *Twopeny* v. *Peyton* (1840), 10 Sim. 487; *Godden* v. *Crowhurst* (1842), 10 Sim. 642; *Re Bullock* (1891), 60 L. J. (CH.) 341; see *Re Coleman* (1888), 39 Ch. D. 443.

(*n*) *Re Ashby, Ex parte Wreford*, [1892] 1 Q. B. 872.

(*o*) *Roe* v. *Galliers* (1787), 2 Term Rep. 133. If the landlord enters for forfeiture on a tenant's bankruptcy and there are growing crops on the land, the crops belong to the landlord, and not to the tenant's creditors (*Davis* v. *Eyton* (1830), 7 Bing. 154). A provision in a lease giving the tenant right to compensation for certain crops "at the expiration of the term" has no application when the landlord enters for a forfeiture on the tenant's bankruptcy (*Silcock* v. *Farmer* (1882), 46 L. T. 404). As to growing crops in general, see title AGRICULTURE. If a landlord enters for a forfeiture on bankruptcy, and there is a special contract relating to fixtures which belong to the tenant, the trustee is entitled to have a reasonable time to remove such fixtures (*Stansfield* v. *Mayor etc. of Portsmouth* (1858), 27 L. J. (C. P.) 124). If there is no special contract, the right to remove the fixtures is gone when the term is at an end (*Pugh* v. *Arton* (1869), L. R. 8 Eq. 626). As to fixtures generally, see titles AGRICULTURE, and LANDLORD AND TENANT. Forfeiture takes places although the proviso in the lease contemplates a petition under a former Bankruptcy Act (*Ex parte Gould, Re Walker* (1884), 13 Q. B. D. 454).

(*p*) *Smith* v. *Gronow*, [1891] 2 Q. B. 394. The proviso runs with the land (*Horsey Estate, Ltd.* v. *Steiger*, [1899] 2 Q. B. 79).

(*q*) 44 & 45 Vict. c. 41. See title LANDLORD AND TENANT.

(*r*) Conveyancing and Law of Property Act, 1892 (55 & 56 Vict. c. 13), s. 2 (2); *Horsey Estate, Ltd.* v. *Steiger, supra*; *Re Riggs, Ex parte Lovell*, [1901] 2 K. B. 16.

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the bankruptcy of the lessee or to an assignment of the lease by the lessee's trustee in bankruptcy, who is entitled to assign the lease without the lessor's consent (*s*). An assignment of the whole of a debtor's property for the benefit of creditors is an act of bankruptcy, and if followed by bankruptcy is void, and therefore does not act as a forfeiture under such a proviso (*t*), but if it is not followed by bankruptcy, then it would operate as a forfeiture (*a*).

Condition impossible of performance by reason of bankruptcy.

252. If the bankrupt at the time of his bankruptcy is, under a will or settlement, entitled in possession or remainder to an interest in premises which is subject to forfeiture on the breach of a condition which would be broken if the interest were realised by the trustee in bankruptcy, *e.g.*, a condition that the person entitled to the use of the premises under the will or settlement should reside there, the interest none the less passes to the trustee, and it seems that on bankruptcy such a condition would cease to operate (*b*).

Conditions for forfeiture on settlor's bankruptcy.

253. No one can deal with his own property in such a way as to provide for a different distribution of it in the event of bankruptcy from that which the law prescribes (*c*). This principle applies not only to voluntary settlements which may be avoided as fraudulent under the statute 13 Eliz. c. 5, if the necessary effect of the instrument is to defeat, hinder, or delay creditors (*d*), but to marriage settlements and other contracts for valuable consideration; any such disposition providing for a distribution different from that which the law prescribes in case of bankruptcy is void, so far as such a provision is concerned. Thus, no one possessed of property can reserve that property to himself, until he should become bankrupt, and provide that on his bankruptcy the property should pass to someone else and not to his creditors (*e*). A provision in a marriage settlement or other disposition, whereby there is reserved to the owner of the property

(*s*) *Doe* v. *Bevan* (1815), 3 M. & S. 353; *Doe* v. *Smith* (1814), 5 Taunt. 795; *Re Riggs, Ex parte Lovell*, [1901] 2 K. B. 16.

(*t*) *Powell* v. *Lloyd* (1828), 2 Y. & J. 372; but see *Stein* v. *Pope*, [1902] 1 K. B. 595, as to the effect of an assignment for the benefit of creditors on the assignee's liability for rent before the adjudication of the assignor.

(*a*) *Holland* v. *Cole* (1862), 31 L. J. (EX.) 481. As to the effect of a covenant in such an assignment to stand possessed of leasehold property upon trust for the trustees of the deed, see *Gentle* v. *Faulkner*, [1900] 2 Q. B. 267. Where a lease contains conditions as to forfeiture on the tenant's bankruptcy and on the tenant's assigning without licence, and the landlord after the tenant's bankruptcy accepts rent from the trustee and treats him as tenant, the condition as to forfeiture on bankruptcy is gone, and *quære* whether in such a case the landlord can insist on the condition as to forfeiture for assigning without licence (*Dyke* v. *Taylor* (1861), 30 L. J. (CH.) 281). See further, title LANDLORD AND TENANT.

(*b*) *Ex parte Goldney, Re Goldney* (1839), 1 Mont. & Ch. 75.

(*c*) *Ex parte Mackay, Ex parte Brown, Re Jeavons* (1873), 8 Ch. App. 643, *per* JAMES, L.J., at p. 647.

(*d*) See *Freeman* v. *Pope* (1870), 5 Ch. App. 538; *Ex parte Mercer, Re Wise* (1886), 17 Q. B. D. 290; *Re Holland*, [1902] 2 Ch. 360 (overruling *Re Pearson, Ex parte Stephen* (1876), 3 Ch. D. 807). See generally title FRAUDULENT AND VOLUNTARY CONVEYANCES.

(*e*) *Whitmore* v. *Mason* (1861), 2 John. & H. 204. As to what is a settlement of the bankrupt's own property, see *Re Ashby, Ex parte Wreford*, [1892] 1 Q. B. 872; *Re Stephenson, Ex parte Brown*, [1897] 1 Q. B. 638.

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a life interest determinable on bankruptcy is ineffective as against the settlor's trustee in bankruptcy, so far as relates to the determination on bankruptcy; on the bankruptcy of the settlor his life interest will pass to his creditors (*f*). But if a settlor settles property on himself, until he should assign, charge, or incumber it, such a settlement is valid, and if he assigns or charges the property to a particular alienee before bankruptcy, the limitation over will take effect, and will not be avoided by a subsequent bankruptcy, but in the event of bankruptcy prior to an assignment or charge the limitation over will not take effect (*g*).

Settlement of wife's property.

If a husband settles his own property and also his wife's, or, if he makes a settlement of his own property after having received the property of his wife, the life estate of the husband will not determine on bankruptcy as regards his own property, but the limitation over will be valid to the extent of the wife's property (*h*).

Forfeiture of share in partnership.

254. A proviso in a partnership deed that, in the event of the bankruptcy of one of the partners, his share should go over to his co-partners, is void as being in fraud of the bankruptcy laws (*i*); so is a proviso that the bankrupt partner should in the event of his bankruptcy receive for his share a smaller sum than its real value (*k*). Such arrangements between partners are valid only as between themselves, and do not bind creditors, and the trustee in bankruptcy of the bankrupt partner is entitled in spite of such arrangements to an account of the estate and profits of the partnership (*l*).

Shareholders.

A proviso in a company's articles of association that a shareholder in the event of his bankruptcy should sell his shares to particular persons at a particular price is good, if the price is fixed for all persons alike, and is not less than the fair price which might be obtained, but a provision that in the event of bankruptcy the

(*f*) *Higinbotham* v. *Holme* (1812), 19 Ves. 88; *Re Brewer*, [1896] 2 Ch. 503. See *Re Holland*, [1902] 2 Ch. 360. If a settlement by the settlor providing for the forfeiture of his life interest in the event of his bankruptcy is set aside as fraudulent under the statute 13 Eliz. c. 5, the bankruptcy of the settlor may none the less, as against himself and those claiming under a second bankruptcy, operate as a forfeiture of his life interest (*Re Johnson Johnson, Ex parte Matthews and Wilkinson*, [1904] 1 K. B. 134).

(*g*) *Brooke* v. *Pearson* (1859), 27 Beav. 181; *Knight* v. *Browne* (1861), 9 W. R. 515; *Re Detmold* (1889), 40 Ch. D. 585; *Re Brewer*, [1896] 2 Ch. 503. A limitation over in the event of an alienation is valid, if there is an involuntary alienation by process of law in favour of a judgment creditor, but not where the involuntary alienation takes place by virtue of bankruptcy (see *Re Detmold, supra*); such a limitation over would not take effect on the assignment of the settlor's property for the benefit of his creditors generally (*ibid.*, at p. 588).

(*h*) *Lester* v. *Garland* (1832), 5 Sim. 205; *Mackintosh* v. *Pogose*, [1895] 1 Ch. 505.

(*i*) *Whitmore* v. *Mason* (1861), 2 John. & H. 204.

(*k*) *Wilson* v. *Greenwood* (1818), 1 Swan. 471; *Ex parte Warden, Re Williams* (1872), 21 W. R. 51. It seems that a provision in articles of partnership that on the bankruptcy of one partner his share should be taken by the solvent partners at a sum to be fixed by valuation and payable by instalments extending over a course of years is void as repugnant to the bankruptcy law; see *Wilson* v. *Greenwood, supra*.

(*l*) *Ex parte Warden, Re Williams* (1872), 21 W. R. 51, *per* BACON, C.J., at p. 52.

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shares should be sold at a lower price would be repugnant to the bankruptcy laws and therefore void (*m*).

Mortgagors.

255. A contract between a mortgagor and a mortgagee providing that there should be a different distribution of the mortgagor's property in the event of his bankruptcy, or that the mortgagee should have an additional benefit on such an event is void (*n*).

Builders.

256. A stipulation in a building contract that on the bankruptcy of the builder the materials brought by him upon the ground should be forfeited to the building owner is void, as being an attempt to control the user after bankruptcy of property vested in the bankrupt at the date of the bankruptcy, and the materials would notwithstanding in the event of the builder's bankruptcy pass to his creditors (*o*). But a stipulation is valid which provides that on default of the builder in fulfilling his part of the agreement the building owner might expel the builder, and that the materials brought by the builder on the land should be forfeited; and the right of forfeiture is not affected by the bankruptcy of the builder, and may be exercised after his bankruptcy (*p*).

Property vesting in trustee.

257. All property (*q*) which belongs to the bankrupt at the commencement of his bankruptcy, or which is acquired by or devolves upon him before his discharge (*r*), and which is also capable of passing to the trustee (*s*) and is not specially excepted, vests in the trustee

(*m*) *Borland's Trustee* v. *Steel Brothers & Co., Ltd.*, [1901] 1 Ch. 279.

(*n*) *Ex parte Williams, Re Thompson* (1877), 7 Ch. D. 138; *Ex parte Mackay, Ex parte Brown, Re Jeavons* (1873), 8 Ch. App. 643. See *Re Stockton Iron Furnace Co.* (1879), 10 Ch. D. 335.

(*o*) *Ex parte Jay, Re Harrison* (1880), 14 Ch. D. 19; *Ex parte Barter, Ex parte Black, Re Walker* (1884), 26 Ch. D. 510.

(*p*) *Brown* v. *Bateman* (1867), L. R. 2 C. P. 272; *Re Waugh, Ex parte Dickin* (1876), 4 Ch. D. 524; *Ex parte Newitt, Re Garrud* (1881), 16 Ch. D. 522; *Re Keen & Keen, Ex parte Collins*, [1902] 1 K. B. 555. But if a building agreement gives a power of forfeiture in the event of bankruptcy and also in the event of the failure of the builder to complete, and the building owner seizes on bankruptcy, he cannot afterwards avail himself of the right to seize for the failure to complete (*Ex parte Barter, Ex parte Black, Re Walker, supra*). A clause in a building agreement that materials brought upon the ground are to be the property of the building owner vests the materials in the building owner, subject to a condition of defeasance, if the builder completes the work; such a clause is a security to the building owner for the performance of the work (*Hart* v. *Porthgain Harbour Co., Ltd.*, [1903] 1 Ch. 690). See title BUILDING CONTRACTS ETC.

(*q*) Bankruptcy Act, 1883 (46 & 47 Vict. c. 52), ss. 44, 68. For the definition of property, see *ibid.*, s. 168 (1), p. 14, *ante*.

(*r*) See p. 144, *ante*. As to property acquired after the adjudication, see p. 164, *post*.

(*s*) There are some things which are incapable of passing to the trustee—*e.g.*, an English title of honour, such as a peerage, is real property, but it is not a "beneficial interest" (see *Gibson* v. *Carruthers* (1841), 8 M. & W. 321, at p. 333); it is a personal dignity which descends to the posterity of the holder, and is fixed in the blood and cannot be alienated (see *Re Earldom of Norfolk Peerage Claim*, [1907] A. C. 10, *per* Lord DAVEY, at p. 16). See further, title PEERAGE. Rights of action and contracts which are personal to the bankrupt do not pass (see pp. 137, 138, *ante*), nor do interests determinable on bankruptcy (see p. 146, *ante*). Property which is specially exempted by statute from bankruptcy jurisdiction does not pass. Thus, the Police Act, 1890 (53 & 54 Vict. c. 45), s. 7,

on the adjudication (*t*). Such property, whether situate in England or elsewhere, vests in the trustee by the force of the statute without any conveyance or assignment, unless the property be the profits of a benefice held by a beneficed clergyman, in which case the trustee must obtain a sequestration order (*a*), or unless it be real estate situate outside the United Kingdom, when it only passes according to the law of the place where the property is situated (*b*).

provides that a pension under that Act shall not pass to the trustee or any person claiming on behalf of creditors; compare *Ex parte Painter, Re Painter*, [1895] 1 Q. B. 85. But in the absence of any statutory provisions specially exempting property from bankruptcy jurisdiction, if property, even though inalienable, is of a beneficial nature, it passes to the trustee (*Ex parte Huggins* (1882), 21 Ch. D. 85, *per* JESSEL, M.R., at p. 92; *Ex parte Graves, Re Harris* (1881), 19 Ch. D. 1), and the court has jurisdiction to make an order by which part of the income of such property may be paid to the trustee (*Re Saunders, Ex parte Saunders*, [1895] 2 Q. B. 424; *Crowe* v. *Price* (1889), 22 Q. B. D. 429. As to property settled on a married woman with a restraint on anticipation, see note (*e*), p. 146, *ante*.

A bill of exchange accepted for the accommodation of the bankrupt, though in the hands of the bankrupt, does not pass to the trustee, and may be indorsed by the bankrupt after bankruptcy (*Wallace* v. *Hardacre* (1807), 1 Camp. 45, 47). Such a bill is not, it seems, property, for the bankrupt could not sue on it; and it seems that, as it is not property, the capacity of the bankrupt to indorse it is not "a capacity to exercise and to take proceedings for exercising" a power "in over or in respect of property" within the Bankruptcy Act, 1883 (46 & 47 Vict. c. 52), s. 44 (ii.), and therefore that such a capacity would not pass to the trustee, and that the bankrupt could not be compelled to indorse it for the benefit of his creditors under *ibid.*, s. 24. But it seems that any sum which the bankrupt received in respect of the indorsement and negotiation of such a bill would belong to the trustee, if he claimed it. See p. 164, *post*.

(*t*) Bankruptcy Act, 1883 (46 & 47 Vict. c. 52), s. 20 (1).

(*a*) *Hopkins* v. *Clarke* (1864), 5 B. & S. 753, and see pp. 189, 190, *post*. Bankruptcy Act, 1883 (46 & 47 Vict. c. 52), s. 52.

(*b*) See *Ex parte Rogers, Re Boustead* (1881), 16 Ch. D. 665, at p. 666.

The Bankruptcy Act, 1883 (46 & 47 Vict. c. 52), is an imperial statute vesting in the trustee without conveyance or assignment the property of a person made bankrupt under it in all the dominions of the British Crown (*Callender, Sykes & Co.* v. *Colonial Secretary of Lagos and Davies*, [1891] A. C. 460, at p. 467). Before the Bankruptcy Act, 1883, real property situated outside the British dominions did not pass on bankruptcy; the law was changed in this respect by the Act of 1883, which imposes on the bankrupt a personal obligation enforceable by the punitive process of the Court to do all acts necessary for completing the title of the trustee to all property situate outside the British dominions (*Re Harris* (1896), 74 L. T. 221; Bankruptcy Act, 1883, s. 24 (2), (3), (4), s. 168 (1)). By the rules of private international law immovable property can only be transferred in accordance with the *lex rei sitæ;* movables, on the other hand, follow the person and, wherever situate, are bound by an adjudication in bankruptcy in the country where the bankrupt is domiciled, unless the particular law of the country where the property is situate specially prevents this (*Philips* v. *Hunter* (1795), 2 Hy. Bl. 401; *Royal Bank of Scotland* v. *Cuthbert* (1813), 1 Rose, 462, *Selkrig* v. *Davies* (1814), 2 Dow, 230; *Cockerell* v. *Dickens* (1840), 1 Mont. D. & De G. 45; *Re Blithman* (1866), L. R. 2 Eq. 23; *Banco de Portugal* v. *Waddell* (1880), 5 App. Cas. 161; *Re Hayward*, [1897] 1 Ch. 905. See title CONFLICT OF LAWS). As to the difference between English and American authorities on this point, see Story, Conflict of Laws, ss. 403 *et seq.* If a creditor who is subject to the jurisdiction of the English Courts recovers, with notice of an English bankruptcy, debts due to him from the bankrupt abroad, such a creditor is bound, when proving in the English bankruptcy, to bring into account the sums so recovered (*Philips* v. *Hunter, supra; Cockerell* v. *Dickens* (1840), 1 Mont. D. & De G. 45; *Re Oriental Inland Steam Co., Ex*

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Trustee takes same estate or right as bankrupt had.

258. The property of the bankrupt passes to the trustee in the same plight and condition in which it was in the bankrupt's hands, and is subject to all the equities and liabilities which affected it in the bankrupt's hands, and to all dispositions which have been validly made by the bankrupt, and to all rights which have been validly acquired by third persons at the commencement of the bankruptcy, unless the property which the trustee takes is increased by some express provision of the bankruptcy law (*c*). If the bankrupt is possessed of an unincumbered estate in fee simple, that estate passes to the trustee; if he is a tenant in tail or a tenant for life, the trustee has that estate and no more (*d*).

parte Scinde Rail. Co. (1874), 9 Ch. App. 557; *Banco de Portugal* v. *Waddell*, (1880), 5 App. Cas. 161; it is otherwise where the proceedings are *in rem* (*Minna Craig Steamship Co.* v. *Chartered Mercantile Bank of India, London, and China*, [1897] 1 Q. B. 55).

(*c*) *Ex parte Holthausen, Re Scheibler* (1874), 9 Ch. App. 722; *Ex parte Newitt, Re Garrud* (1881), 16 Ch. D. 522, *per* JAMES, L.J., at p. 531; *Re Wallis, Ex parte Jenks*, [1902] 1 K. B. 719; *Re Clark, Ex parte Beardmore*, [1894] 2 Q. B. 393, *per* DAVEY, L.J., at p. 410; *Re Beeston*, [1899] 1 Q. B. 626, *per* LINDLEY, M.R., at p. 630. A bankrupt's trustee may upset fraudulent conveyances of a bankrupt's property made before bankruptcy, and some dispositions which would have been valid, if there had been no bankruptcy (see ss. 47, 48, of the Bankruptcy Act, 1883 (46 & 47 Vict. c. 52), and pp. 275 *et seq.*, *post*); an assignment of personal property by an invalid bill of sale or mortgage would be invalid as against the trustee in bankruptcy (*Ex parte Arrowsmith, Re Leveson* (1878), 8 Ch. D. 96; *Re Smith* (1890), 25 L. R. Ir. 439). Property which the bankrupt before bankruptcy has affected to sell by a transaction which is colourable and not real will be divisible among his creditors on bankruptcy (*Re Carl Hirth, Ex parte the Trustee*, [1899] 1 Q. B. 612). When money has been paid under an illegal contract and the bankrupt under the rule *in pari delicto melior est conditio possidentis* could not have recovered it, the trustee is in a better position than the bankrupt and may sue for the money (*Ex parte Wolverhampton and Staffordshire Banking Co., Re Campbell* (1884), 14 Q. B. D. 32, distinguishing *Re Mapleback, Ex parte Caldecott* (1876), 4 Ch. D. 150; and see *Nicholson* v. *Gooch* (1856), 5 E. & B. 999). A bankrupt cannot as against his trustee set up the illegality of the title by which the bankrupt became entitled to property (*Shoolbred* v. *Roberts*, [1900] 2 Q. B. 497, *per* ROMER, L.J., at p. 503). On the other hand, money paid into Court before bankruptcy in an action brought against the bankrupt is specifically fixed with the equities of the plaintiff, and the trustee in bankruptcy has no rights over it except subject to such equities (*Ex parte Hitchens, Re Congreve* (1831), Mont. 225; *Murray* v. *Arnold* (1862), 32 L. J. (Q. B.) 11; *Ex parte Banner, Re Keyworth* (1874), 9 Ch. App. 379). The trustee takes the bankrupt's property subject to all liens and contingent liabilities; thus, where a person was arrested on a charge of felony, and money was found on him, and after arrest and before conviction he was adjudged bankrupt, and on his conviction an order was made under the Forfeiture Act, 1870 (33 & 34 Vict. c. 23), s. 3, that the money found on him should be applied towards the costs of the prosecution, it was held that the order was valid notwithstanding the intervening bankruptcy (*R.* v. *Roberts* (1873), L. R. 9 Q. B. 77). Property, possession of which has been obtained by the bankrupt by fraud or mistake, does not pass to the bankrupt, and remains in the original owner (*Gladstone* v. *Hadwen* (1813), 1 M. & S. 517; *Load* v. *Green* (1846), 15 M. & W. 216, at p. 221; *Ex parte Whittaker, Re Shackleton* (1875), 10 Ch. App. 446; *Re Reed, Ex parte Barnett* (1876), 3 Ch. D. 123); but not where the bankrupt, having a voidable title to goods, has disposed of them to a *bonâ fide* purchaser without notice before the title has been avoided (Sale of Goods Act, 1893 (56 & 57 Vict. c. 71), s. 23). As to the effect of bankruptcy on the rights of a creditor who has levied execution, see p. 271, *post*.

(*d*) As to the rights of the trustee over estates tail of the bankrupt, see *Johnson* v. *Smiley* (1853), 17 Beav. 223; Bankruptcy Act, 1883 (46 & 47 Vict. c. 52),

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Mortgaged property.

If any part of the property of the bankrupt has been mortgaged, the equity of redemption is all that passes to the trustee, and the property is subject to the rights of the mortgagee to take possession even after the bankruptcy and to exercise all the other rights of a mortgagee (*e*).

Leaseholds.

Leasehold property of the bankrupt, if not disclaimed by the trustee (*f*), passes to him subject to the landlord's rights as to rent and to the enforcement of the covenants under which the land is held (*g*) and which bind assigns, except any covenants that by

s. 56 (5). As to the rights of an assignee from the trustee in bankruptcy of an equitable life interest in real estate to be let into possession of the rents and profits, see *Re Hunt*, [1900] W. N. 65, and on appeal [1901] W. N. 144.

(*e*) The mortgagee will be entitled as against the trustee to the fixtures on the mortgaged property (*Ex parte Spicer, Re Allnutt* (1837), 2 Deac. 335; *Ex parte Cotton, Re Nutter* (1842), 2 Mont. D. & De G. 725; *Ex parte Price, Re Stead* (1842), 2 Mont. D. & De G. 518; *Ex parte Bentley, Re West* (1842), 2 Mont. D. & De G. 591; *Ex parte Tagart, Re Mackie* (1847), De G. 531; *Ex parte Cowell, Re Inwood* (1848), 17 L. J. (BCY.) 16; *Mather* v. *Fraser* (1856), 25 L. J. (CH.) 361; *Waterfall* v. *Penistone* (1857), 26 L. J. (Q. B.) 100; *Boyd* v. *Shorrock* (1867), L. R. 5 Eq. 72; *Ex parte Astbury, Ex parte Lloyd's Banking Co., Re Richards* (1869), 4 Ch. App. 630; *Longbottom* v. *Berry* (1869), 39 L. J. (Q.B.) 37; *Holland* v. *Hodgson* (1872), 41 L. J. (C. P.) 146; *Ex parte Punnett, Re Kitchin* (1880), 16 Ch. D. 226; *Hobson* v. *Gorringe*, [1897] 1 Ch. 182; *Reynolds* v. *Ashby & Son, Ltd.*, [1903] 1 K. B. 87 (distinguishing *Gough* v. *Wood*, [1894] 1 Q. B. 713); *Monti* v. *Barnes*, [1901] 1 K. B. 205; *Ellis* v. *Glover*, [1908] 1 K. B. 388). The mortgagee will also be entitled to the growing crops on the mortgaged property, and may take possession of them even after the bankruptcy (*Bagnall* v. *Villar* (1879), 12 Ch. D. 812); but not when he claims under an unregistered bill of sale and the growing crops have been severed and have become personal chattels and have not been taken by the grantee before the commencement of the bankruptcy; in such a case they will pass to the trustee (*Ex parte National Mercantile Bank, Re Phillips* (1880), 16 Ch. D. 104). If a business is carried on on the mortgaged premises, and the goodwill is such that it is not separable from the premises and would pass on the sale of the premises, the goodwill is the property of the mortgagee (*Ex parte Punnett, Re Kitchin* (1880), 16 Ch. D. 226 (public-house); *Chissum* v. *Dewes* (1828), 5 Russ. 29 (upholsterer's business); *King* v. *Midland Rail. Co.* (1868), 17 W. R. 113 (baker's business)). Stock-in-trade and other personal chattels on mortgaged premises, if not specially included in the mortgage, will pass to the trustee in bankruptcy of the mortgagor (*Ex parte Jardine, Re McManus* (1875), 10 Ch. App. 322; *Lyon & Co.* v. *London City and Midland Bank*, [1903] 2 K. B. 135). If the bankrupt has assigned or mortgaged debts payable at a future time, then if the debts were due at the date of the assignment, but only became payable after bankruptcy, the rights of the assignee or mortgagee will prevail against the rights of the trustee in bankruptcy (*Ex parte Moss, Re Toward* (1884), 14 Q. B. D. 310; *Re Davis & Co., Ex parte Rawlings* (1888), 22 Q. B. D. 193). If the debts only fall due after bankruptcy, the trustee in bankruptcy is entitled to them, and not the assignee or mortgagee (*Ex parte Hall, Re Whitting* (1879), 10 Ch. D. 615; *Collyer* v. *Isaacs* (1881), 19 Ch. D. 342; *Ex parte Nichols, Re Jones* (1883), 22 Ch. D. 782; *Re Rogers, Ex parte Collins*, [1894] 1 Q. B. 425; *Wilmot* v. *Alton*, [1896] 2 Q. B. 254). As to the effect of bankruptcy on a mere licence to seize after-acquired property not amounting to an assignment, see *Thompson* v. *Cohen* (1872), L. R. 7 Q. B. 527; and see p. 65, *ante*. The court has power on the application of a mortgagee of any part of the bankrupt's real or leasehold estate to direct accounts and inquiries to ascertain the principal, interest, and costs due upon the mortgage, and to order a sale (Bankruptcy Rules, rr. 73—77).

(*f*) See p. 191, *post*.

(*g*) See *Ex parte Dressler, Re Solomon* (1878), 9 Ch. D. 252; *Wilson* v. *Wallani* (1880), 5 Ex. D. 155; *Titterton* v. *Cooper* (1882), 9 Q. B. D. 473; *Wilkins* v. *Fry* (1816), 1 Mer. 244, at p. 265. As to the landlord's right to distrain after bankruptcy, see p. 291, *post*; as to the rights of a mortgagee to stand in the place of

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the Bankruptcy Acts are not enforceable against the trustee of a lessee, such as the covenant not to assign without the consent of the landlord (*h*).

Rights of distress or seizure.

The property of the bankrupt is also subject to rights of distress and to any rights of seizure which have been validly created in respect of it (*i*).

Uncompleted contracts.

If the bankrupt before his bankruptcy has contracted to sell or mortgage property, the trustee takes the property subject to an obligation to fulfil the contract (*k*).

Rights in wife's property.

259. If a bankrupt is married and has any interest in his wife's property of which he can dispose, that interest will pass to his trustee (*l*). The interest which a husband has in his wife's property depends upon the date of his marriage (*m*).

Marriage since 1882.

As regards persons married since January 1, 1883, when the Married Women's Property Act, 1882 (*m*), came into force, a husband has no power over his wife's property, and no interest in it will pass to his trustee in bankruptcy (*n*).

the landlord, when a distraint has been levied on goods forming part of his security and also on goods not forming part, see *Ex parte Stephenson* (1847), De G. 586. As regards fixtures on demised premises, as between the landlord and the trustee in bankruptcy of the tenant, the trustee is in the tenant's shoes, and is *primâ facie* entitled to the tenant's or trade fixtures (*Stansfield* v. *Mayor etc. of Portsmouth* (1858), 27 L. J. (C. P.) 124; *Pugh* v. *Arton* (1869), L. R. 8 Eq. 626; *Ex parte Gould, Re Walker* (1884), 13 Q. B. D. 454; *Lambourn* v. *McLellan*, [1903] 2 Ch. 268). As regards farming leases the trustee in bankruptcy of the tenant is expressly forbidden by the Sale of Farming Stock Act, 1816 (56 Geo. 3, c. 50), s. 11, to take away or use crops in any other way than the bankrupt could have done; therefore, if there is a covenant in a lease against the removal or sale of hay etc., and the lessee becomes bankrupt, then the trustee is bound by the covenant and cannot remove or sell the hay etc., and this is so even although he has disclaimed the lease (*Lybbe* v. *Hart* (1885), 29 Ch. D. 8). See also title AGRICULTURE, Vol. I., p. 275. As regards the claim of the trustee for tillages, and the landlord's claim to set off rent, see *Alloway* v. *Steere* (1882), 10 Q. B. D. 22; *Re Wilson, Ex parte Lord Hastings* (1893), 10 Morr. 219.

(*h*) See pp. 149, 150, *ante*; *Silcock* v. *Farmer* (1882), 46 L. T. 404.

(*i*) *Krehl* v. *Great Central Gas Consumers' Co.* (1870), L. R. 5 Exch. 289; *Ex parte Newitt, Re Garrud* (1881), 16 Ch. D. 522; *Leman* v. *Yorkshire Rail. Wagon Co.* (1881), 50 L. J. (CH.) 293.

(*k*) *Pearce* v. *Bastable's Trustee in Bankruptcy*, [1901] 2 Ch. 122; *Re Bastable, Ex parte the Trustee*, [1901] 2 K. B. 518. But specific performance of a contract by the bankrupt to buy property will not be granted against the trustee without his consent (*Holloway* v. *York* (1877), 25 W. R. 627). As to specific performance of a contract to grant a lease to a bankrupt, see note (*n*), p. 162, *post*; *Ex parte Holthausen, Re Schreibler* (1874), 9 Ch. App. 722.

(*l*) *Miles* v. *Williams* (1714), 1 P. Wms. 249; *Bosvil* v. *Brander* (1718), 1 P. Wms. 458; *Higden* v. *Williamson* (1731), 3 P. Wms. 132; *Ripley* v. *Woods* (1828), 2 Sim. 165.

(*m*) 45 & 46 Vict. c. 75. As regards persons married between August 9, 1870, and January 1, 1883, the provisions of the Married Women's Property Act, 1870 (33 & 34 Vict. c. 93), and the Married Women's Property Act, 1870, Amendment Act, 1874 (37 & 38 Vict. c. 50), may still be applicable in some cases. See generally title HUSBAND AND WIFE.

(*n*) The incipient right which a husband, on the birth of any issue of the marriage has, as tenant by the curtesy to his wife's real property undisposed of at her death, is not affected by the Married Women's Property Act, 1882 (45 & 46 Vict. c. 75) (*Hope* v. *Hope*, [1892] 2 Ch. 336). Such a right would, perhaps, pass to the husband's trustee in bankruptcy, but is liable to be defeated by the wife's disposition of her property. If the real estate of the wife has not fallen into her possession before the husband's discharge, the husband's

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If the marriage took place before January 1, 1883, the husband has no power during his wife's life over any property of his wife the title to which accrued subsequently to that date (*o*); as regards all other property the husband has the same rights as he had before the Married Women's Property Act, 1882, and such rights as he can dispose of will pass to his trustee on his bankruptcy. The rights which a husband married before January 1, 1883, has in his wife's property the title to which accrued before that date are, in addition to his right as tenant by the curtesy, as follows: He is entitled during the coverture to the rents and profits of her real estate to which she is not entitled for her separate use (*p*), and to all his wife's personal chattels in possession, to his wife's chattels real to which she is not entitled for her separate use (*q*), but not to an interest of his wife's which is of such a nature that it cannot vest in possession during her husband's life, *e.g.*, a reversionary interest expectant on his death (*r*). On the death of a wife in the lifetime of her husband all her personal property undisposed of passed to him (*s*). All these rights pass to the trustee of the husband on his bankruptcy (*a*).

Marriage before 1883.

The wife's choses in action which do not belong to her for her separate use do not vest absolutely in her husband, or in his trustee if he becomes bankrupt, unless they are actually reduced into possession during the coverture, and if they are not so reduced they will belong absolutely to her on her surviving her husband, and no interest in them will pass to the trustee (*b*). The trustee of a

Wife's choses in action.

right is a mere possibility and does not pass to the trustee (*Gibbins* v. *Eyden* (1869), L. R. 7 Eq. 371). The husband will also be entitled, on the death of his wife, to all her personal property that has not been disposed of (*Re Lambert* (1888), 39 Ch. D. 626).

(*o*) Married Women's Property Act, 1882 (45 & 46 Vict. c. 75), s. 5. Title here means the whole title, and if the wife had a reversionary interest before January 1, 1883, the property will be subject to the husband's rights (*Reid* v. *Reid* (1886), 31 Ch. D. 402; *Re Dixon* (1887), 35 Ch. D. 4). A *spes successionis* is not a title (*Re Parsons* (1890), 45 Ch. D. 51).

(*p*) *Robertson* v. *Norris* (1848), 11 Q. B. 916. The trustee in bankruptcy of the husband takes an estate of freehold in the wife's real estate during the coverture (*Michell* v. *Hughes* (1830), 6 Bing. 689, at p. 695), but has no absolute right to the custody of the title-deeds (*Ex parte Rogers, Re Pyatt* (1884), 26 Ch. D. 31).

(*q*) *Mitford* v. *Mitford* (1803), 9 Ves. 87, at p. 98; *Doe* v. *Steward* (1834), 1 Ad. & El. 300; *Donne* v. *Hart* (1831), 2 Russ. & M. 360. If a wife entitled to a term of years dies, it is not necessary for the husband to take out letters of administration to her in order to complete his title to the term (*Re Bellamy* (1883), 25 Ch. D. 620). See *Surman* v. *Wharton*, [1891] 1 Q. B. 491.

(*r*) See *Re Lambert* (1888), 39 Ch. D. 626. Under the law before the Married Women's Property Act a married woman could only in certain cases dispose of her property by will except with the consent of her husband. See title HUSBAND AND WIFE.

(*s*) *Duberley* v. *Day* (1852), 16 Beav. 33.

(*a*) The husband's right to administer to his wife's estate does not pass to the trustee, but a grant of administration may in a proper case be made to the trustee (*In the goods of Turner* (1886), 12 P. D. 18).

(*b*) An assignment by the husband is not a sufficient reduction into possession. See *Hornsby* v. *Lee* (1816), 2 Madd. 16; *Purdew* v. *Jackson* (1824), 1 Russ. 1; *Honner* v. *Morton* (1828), 3 Russ. 65; *Ashby* v. *Ashby* (1844), 1 Coll. 553; *Mitford* v. *Mitford* (1803), 9 Ves. 87; *Rogers* v. *Acaster* (1851), 14 Beav. 445; *Ellison* v. *Elwin* (1843), 13 Sim. 309; *Le Vasseur* v. *Scratton* (1844), 14

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bankrupt husband cannot sue alone in his own name for a chose in action belonging to the wife and not reduced into possession by the husband, but can only join with her in suing, and if the husband dies before execution on the judgment is levied, the trustee loses all his right over the subject-matter of the action (*c*). If the wife dies in the husband's lifetime, and the husband is bankrupt, his trustee will be entitled to all her choses in action not belonging to her for her separate use, and not disposed of by her, and not at her death reduced into possession (*d*).

If the trustee of the husband cannot recover a chose in action, or any other interest of the wife to which the husband is entitled, without the aid of a court of equity, the wife has what is called an equity to a settlement, *i.e.*, the court will not give its aid unless some provision is made for the wife out of the property, and the court of bankruptcy will on the application of the wife in such a case make an order for an allowance (*e*).

Separate property.

Property settled on the wife for her separate use is not affected by her husband's bankruptcy, and no interest in it will pass to his trustee on his bankruptcy (*f*).

Sim. 116. Nor is a direction by the husband to transfer the property into the names of trustees for the wife (*Ryland* v. *Smith* (1836), 1 My. & Cr. 53); but a direction of the husband to pay the money to trustees followed by such payment and by the husband giving a release and receipt is a sufficient reduction (*Hamilton* v. *Mills* (1861), 29 Beav. 193); *aliter* where the husband gives no release (*Harrison* v. *Andrews* (1843), 13 Sim. 595). If a husband sues in his own name and recovers judgment for choses in action of his wife, that is a reduction into possession by him (*Oglander* v. *Vaston* (1686), 1 Vern. 396; *Garforth* v. *Bradley* (1755), 2 Ves. Sen. 675, at p. 676). But see *Bond* v. *Simmons* (1743), 3 Atk. 20. As to what constitutes reduction into possession, see further *Prole* v. *Soady* (1868), 3 Ch. App. 220; *Parker* v. *Lechmere* (1879), 12 Ch. D. 256.

(*c*) *Sherrington* v. *Yates* (1844), 12 M. & W. 855.

(*d*) See *Surman* v. *Wharton*, [1891] 1 Q. B. 491.

(*e*) *Ex parte Thompson, Ex parte Cater, Re Wyatt* (1836), 2 Mont. & A. 505; *Sturgis* v. *Champneys* (1839), 5 My. & Cr. 97; *Gleaves* v. *Paine* (1863), 1 De G. J. & Sm. 87; *Tidd* v. *Lister, Basil* v. *Lister* (1852), 10 Hare, 140; *Taunton* v. *Morris* (1879), 11 Ch. D. 779; *Osborn* v. *Morgan* (1852), 9 Hare, 432. As to the right of the children to the benefit of the equity on the death of the wife, see *Murray* v. *Lord Elibank* (1804), 10 Ves. 84; *Lloyd* v. *Mason* (1845), 5 Hare, 149; *Lloyd* v. *Williams* (1816), 1 Madd. 450; *De la Garde* v. *Lempriere* (1843), 6 Beav. 344; *Baker* v. *Bayldon* (1848), 8 Hare, 210. As to the amount to be settled (generally the half, sometimes more, and occasionally the whole), see *Beresford* v. *Hobson* (1816), 1 Madd. 362; *Spirett* v. *Willows* (1866), 1 Ch. App. 520; *Barron* v. *Barron* (1854), 3 De G. M. & G. 782; *Dunkley* v. *Dunkley* (1852), 2 De G. M. & G. 390; *Layton* v. *Layton* (1853), 1 Sm. & G. 179; *Re Lewin's Trust* (1855), 20 Beav. 378; *Taunton* v. *Morris* (1879), 11 Ch. D. 779; *Gilchrist* v. *Cator* (1847), 1 De G. & Sm. 188; *Bayshaw* v. *Winter* (1852), 5 De G. & Sm. 466; *Ex parte Pugh* (1852), 1 Drew. 202; *Gardner* v. *Marshall* (1845), 14 Sim. 575; *Vaughan* v. *Buck* (1851), 1 Sim. (N. S.) 284; *Scott* v. *Spashett* (1851), 3 Mac. & G. 599; *Re Suggitt* (1868), 3 Ch. App. 215. Where the wife's property is settled under the order of the Court giving effect to her equity to a settlement, the ordinary rule is that the limitation over on the failure of issue of the marriage, and on the wife dying, should be to the husband (*Carter* v. *Taggart* (1852), 1 De G. M. & G. 286; *Ward* v. *Yates* (1860), 1 Drew. & Sm. 80; *Spirett* v. *Willows* (1868), 4 Ch. App. 407; *Croxton* v. *May* (1870), L. R. 9 Eq. 404; *Walsh* v. *Wason* (1873), 8 Ch. App. 482).

(*f*) *Bennet* v. *Davis* (1725), 2 P. Wms. 316; *Tullett* v. *Armstrong* (1838), 1 Beav. 1. If the husband with her consent receives the income of his wife's separate estate, she cannot recover the amount so received from her husband's

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Loans by or to wife.

260. Any money or other property lent or intrusted by a wife to her husband for the purpose of any trade or business carried on by him will be treated as part of his assets in his bankruptcy, and she will be entitled to rank as a creditor in respect of such loan against his estate after all the creditors for valuable consideration have been satisfied (*g*). If a husband has made loans or advances to her after marriage, and she is under a contract, express or implied, to repay them out of her separate estate, the husband can maintain an action against her for the purpose of charging her separate estate with such loans or advances (*h*). Such a right would on the bankruptcy of the husband pass to his trustee.

Separate trading by wife.

261. If a married woman carries on a trade separately from her husband with her separate property, the trustee in bankruptcy of her husband will not be entitled to the effects belonging to her in her separate trade (*i*).

Rights arising out of contract.

262. Rights arising out of contracts made by the bankrupt pass to the trustee, if not disclaimed (*k*), subject to the rights of the persons with whom the bankrupt has contracted, and to the rights of third persons which have been created in respect of them (*l*).

Payments to debtor after commencement of bankruptcy.

After adjudication the bankrupt is a complete stranger to his property which belonged to him between the commencement of the bankruptcy and adjudication, and payments then made to him of

estate (*Ex parte Green* (1832), 2 Deac. & Ch. 113; *Caton* v. *Rideout* (1849), 1 Mac. & G. 599), nor can she recall a gift by her to her husband, as when she pays money into a bank to her husband's credit. See *Ex parte Grainger* (1871), 24 L. T. 334. As to separate use, see *Tullett* v. *Armstrong* (1838), 1 Beav. 1; *Parker* v. *Brooke* (1804), 9 Ves. 583; *Re Peacock* (1879), 10 Ch. D. 490; *Bennet* v. *Davis* (1725), 2 P. Wms. 316; *Tyrrell* v. *Hope* (1743), 2 Atk. 558; *Ex parte Whitehead, Re Whitehead* (1885), 14 Q. B. D. 419; *Taylor* v. *Meads* (1865), 34 L. J. (CH.) 203; *Pride* v. *Bubb* (1871), 7 Ch. App. 64; *Ex parte Pannell, Re Jamieson* (1889), 37 W. R. 464; Married Women's Property Act, 1882 (45 & 46 Vict. c. 75), s. 1. Gifts of the husband to the wife during her marriage are her separate property, and do not pass on his bankruptcy to his trustee (*Graham* v. *Londonderry* (1746), 3 Atk. 393; *Grant* v. *Grant* (1865), 34 Beav. 623). But such gifts are liable to be set aside in bankruptcy if made within ten years of the bankruptcy (*Re Vansittart, Ex parte Brown*, [1893] 1 Q. B. 181). Articles of jewellery the possession of which is given by the husband to the wife for her adornment without relinquishing his own property in them constitute paraphernalia, and are subject to the claims of the husband's creditors. See *Ridout* v. *Earl of Plymouth*, (1740), 2 Atk. 104; *Graham* v. *Londonderry* (1746), 3 Atk. 393. As to the difference between gifts and paraphernalia, see *Tasker* v. *Tasker*, [1895] P. 1.

(*g*) Married Women's Property Act, 1882 (45 & 46 Vict. c. 75), s. 3. If a wife lends money to a trading partnership of which her husband is a member, she can on the bankruptcy of the partnership prove in competition with other creditors (*Re Tuff, Ex parte Nottingham* (1887), 19 Q. B. D. 88). If she lends money to her husband for private purposes unconnected with trade or business, she will be able to prove along with the other creditors (*Re Tidswell, Ex parte Tidswell* (1887), 56 L. J. (Q. B.) 548).

(*h*) *Butler* v. *Butler* (1885), 16 Q. B. D. 374.

(*i*) *Lavie* v. *Phillips* (1765), 3 Burr. 1776.

(*k*) See p. 191, *post*.

(*l*) *Ex parte Newitt, Re Garrud* (1881), 16 Ch. D. 522, *per* JAMES, L.J., at p. 531; see p. 154, *ante*. As to a debtor obtaining possession of property sold to him pending bankruptcy proceedings, see *Ex parte Whittaker, Re Shackleton* (1875), 10 Ch. App. 446.

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debts then due which pass to the trustee, are completely inoperative and do not discharge the debtor (*m*); no assignment even for value of any interest of the bankrupt can after the adjudication be of any avail against the trustee or confer any rights on the assignee (*n*).

Goodwill.

263. If the bankrupt has before his bankruptcy carried on a business, the goodwill of the business passes on adjudication to his trustee, except where the business premises have been mortgaged and the goodwill is attached to the premises, in which case it passes to the mortgagee (*o*), and except where the goodwill is personal to the bankrupt, as in the case of a professional man, in which case, it seems, it would not pass (*p*). Compensation which is given by a statute to a bankrupt for the destruction of his business is analogous to goodwill and passes to the trustee (*q*).

Sale of goodwill by trustee.

On the sale of the goodwill of a bankrupt's business by the trustee

(*m*) *Ponsford, Baker & Co.* v. *Union of London and Smith's Bank, Ltd.*, [1906] 2 Ch. 444, *per* FLETCHER MOULTON, L.J., at pp. 452, 453; *Ex parte Rabbidge, Re Pooley* (1878), 8 Ch. D. 367. But a debt due, if paid before the bankruptcy by a post-dated cheque which does not become due till after the bankruptcy, is validly discharged, and there is no obligation on the person paying to stop payment of the cheque on receiving notice of the bankruptcy (*Ex parte Richdale, Re Palmer* (1882), 19 Ch. D. 409). An acknowledgment to the bankrupt after bankruptcy of the bankrupt's right to an equity of redemption in respect of a mortgage made before bankruptcy is inoperative (*Markwick* v. *Hardingham* (1880), 15 Ch. D. 339, 352).

(*n*) *Ex parte Cooper, Re Green* (1878), 39 L. T. 260. But it seems that, as regards equitable choses in action, an assignee for value from a bankrupt can, by giving notice to the holder of the fund, obtain priority of the trustee in bankruptcy (*Palmer* v. *Locke* (1881), 18 Ch. D. 381, in which JESSEL, M.R., at p. 384, distinguished *Re Bright's Settlement* (1880), 13 Ch. D. 413, which was a decision to the contrary effect). See *Re Stone*, [1893] W. N. 50. A trustee in bankruptcy may by his negligence or other conduct so behave as to allow third persons to acquire rights over the bankrupt's property, and may in such a case be precluded from asserting his claim (*Re London and Provincial Telegraph Co.* (1870), L. R. 9 Eq. 653; *Ex parte Hannington, Re Stafford* (1870), 18 W. R. 959; *Ex parte Bollard, Re Dysart* (1878), 9 Ch. D. 312; *Mason* v. *Briggs* (1885), 1 T. L. R. 502). But the mere act of leaving property such as furniture in the bankrupt's possession does not deprive the trustee of his rights over it or enable the bankrupt to create valid interests in it in third persons, though the case is different, if the trustee allows the bankrupt to trade with his property or has knowledge that the bankrupt is raising money on it (*Meggy* v. *Imperial Discount Co.* (1878), 3 Q. B. D. 711).

(*o*) See p. 155, *ante*.

(*p*) See *Farr* v. *Pearce* (1818), 3 Madd. 74. The right to publish a newspaper which has been published by the bankrupt passes to his trustee (*Longman* v. *Tripp* (1805), 2 B. & P. (N. R.) 67; *Ex parte Foss, Re Baldwin* (1858), 2 De G. & J. 230). As to the rights of a trustee to the goodwill of a bankrupt's business, see *Cruttwell* v. *Lye* (1810), 17 Ves. 335; *Ex parte Thomas* (1841), 2 Mont. D. & De G. 294; *Hudson* v. *Osborne* (1869), 39 L. J. (CH.) 79; *Walker* v. *Mottram* (1881), 19 Ch. D. 355; *Buxton and High Peak Publishing and General Printing Co.* v. *Mitchell* (1885), Cab. & El. 527; Bankruptcy Act, 1883 (46 & 47 Vict. c. 52), s. 56 (1).

(*q*) See *Chandler* v. *Gardiner*, cited in *Cruttwell* v. *Lye*, *supra*, at pp. 338, 343, where it was held that compensation to the proprietors of privileged and free quays on account of the loss of their exclusive trade by the establishment of the West India Docks passed on bankruptcy to their creditors.

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the bankrupt can, it seems, be compelled to join in the assignment of his business and goodwill for the benefit of his creditors (*r*), but he cannot be compelled to enter into any covenant restricting him from carrying on the same business (*s*). Whether the bankrupt has or has not joined in the assignment of the goodwill to the purchaser, he cannot be restrained from setting up a fresh business or from soliciting his former customers (*t*), except when he has agreed with the purchaser not to carry on a similar business within a prescribed area (*a*). But, although he has a right, except where he has entered into such an agreement, to set up again in business of the same kind next door to his old place of business, he cannot use the trade mark of the old business (*b*), or in any other way represent himself as carrying on the identical business which has been sold (*c*).

Share in partnership.

264. If the bankrupt has carried on business in partnership with other persons, the partnership is dissolved by bankruptcy, but the trustee is entitled to the value of the share of the bankrupt partner and to an account (*d*). If the other partner continues after the bankruptcy to carry on the business with the capital as constituted at the time of bankruptcy, the trustee of the bankrupt partner is entitled to participate in the subsequent profits (*e*).

Patents etc

265. Patents, royalties and trade marks which belong to a bankrupt pass to the trustee (*f*). If a patentee becomes bankrupt and his patent is sold by the trustee, the patentee is not afterwards estopped from alleging that the patent is invalid (*g*).

(*r*) See Bankruptcy Act, 1883 (46 & 47 Vict. c. 52), s. 24 (2), (3); *Walker* v. *Mottram* (1881), 19 Ch. D. 355, at p. 363.

(*s*) *Walker* v. *Mottram* (1881), 19 Ch. D. 355, *per* LUSH and LINDLEY, L.JJ., at p. 363. See *Cruttwell* v. *Lye* (1810), 17 Ves. 335. See generally title SALE OF GOODS.

(*t*) *Walker* v. *Mottram*, *supra*. See *Trego* v. *Hunt*, [1896] A. C. 7, at pp. 13, 14, 23; *Jennings* v. *Jennings*, [1898] 1 Ch. 378, at p. 383.

(*a*) See *Clarkson* v. *Edge* (1863), 33 L. J. (CH.) 443; *Buxton and High Peak Publishing and General Printing Co.* v. *Mitchell* (1885), Cab. & El. 527.

(*b*) *Hudson* v. *Osborne* (1869), 39 L. J. (CH.) 79; *Hammond & Co.* v. *Malcolm Brunker & Co.* (1892), 9 R. P. C. 301; but see *Cotton* v. *Gillard* (1874), 44 L. J. (CH.) 90.

(*c*) *Hudson* v. *Osborne*, *supra*.

(*d*) See *Wilson* v. *Greenwood* (1818), 1 Swan. 471; *Whitmore* v. *Mason* (1861), 2 J. & H. 204; *Ex parte Warden*, *Re Williams* (1872), 21 W. R. 51; Partnership Act, 1890 (53 & 54 Vict. c. 39), s. 33. A limited partnership is not dissolved by the bankruptcy of a limited partner (Limited Partnership Act, 1907 (7 Edw. 7, c. 24)), s. 6 (2). See title PARTNERSHIP.

(*e*) *Crawshay* v. *Collins* (1808), 15 Ves. 218.

(*f*) As to patents, see *Hesse* v. *Stevenson* (1803), 3 Bos. & P. 565; as to royalties, *Re Graydon*, *Ex parte Official Receiver*, [1896] 1 Q. B. 417. A trade mark can only be assigned and transmitted in connection with the goodwill of the business to which it relates (Trade Marks Act, 1905 (5 Edw. 7, c. 15), s. 22). See *Cotton* v. *Gillard* (1874), 44 L. J. (CH.) 90; *Hammond & Co.* v. *Malcolm Brunker & Co.*, *supra*. It seems that a person may have an interest in a trade secret or secret recipe which does not pass to the trustee (*Cotton* v. *Gillard*, *supra*). As to application by a trustee in bankruptcy for the correction of the register of trade marks, see Trade Mark Rules, 1906, r. 90, and title TRADE MARKS AND DESIGNS.

(*g*) *Smith* v. *Cropper* (1885), 10 App. Cas. 249.

SUB-SECT. 2. Available Property in General.

Trustee's right to enforce contracts.

Contracts rights under which pass to trustee.

Election to perform or disclaim.

266. Bankruptcy does not determine a contract (*h*), and among the property which passes to the trustee on adjudication is the right of enforcing certain unexecuted contracts which the bankrupt has entered into, and by which benefit may accrue to the estate (*i*).

Thus all rights under contracts which would pass as part of the bankrupt's personal estate to his personal representatives if he had died, pass to the trustee, but rights under contracts where the personal skill or conduct of the bankrupt forms a material part of the consideration (*k*), which the trustee cannot perform on behalf of the bankrupt, such as a contract to marry or to render personal services or to paint a picture or to write a book, do not pass (*l*).

As regards those contracts which the trustee can perform, the trustee has an election and may disclaim them, in which case the persons who have contracted with the bankrupt may prove in the bankruptcy for damages for the value of the injury sustained by them (*m*); or the trustee may insist on the contract being performed (*n*), and in that case must perform the bankrupt's part of

(*h*) *Brook* v. *Hewitt* (1796), 3 Ves. at p. 255, *Re Sneezum, Ex parte Davis* (1876), 3 Ch. D. 463, at p. 473; *Ex parte Chalmers, Re Edwards* (1873), 8 Ch. App. 289, at pp. 293, 294. Bankruptcy of a principal or of an agent in general determines the authority of the agent to act as agent (*Ex parte Snowball, Re Douglas* (1872), 7 Ch. App. 548; *Re Ashby*, [1892] 1 Q. B. 872; *Minett* v. *Forrester* (1811), 4 Taunt. 541; *Parker* v. *Smith* (1812), 16 East, 382; *Markwick* v. *Hardingham* (1880), 15 Ch. D. 339; *Hudson* v. *Granger* (1821), 5 B. & Ald. 27; but see Conveyancing and Law of Property Act, 1881 (44 & 45 Vict. c. 41), s. 47, and the Conveyancing Act, 1882 (45 & 46 Vict. c. 39), ss. 8, 9). See also title AGENCY, Vol. I., pp. 234, 235. As to the effect of bankruptcy in the case of partnership, see note (*d*), p. 161, *ante*.

(*i*) The simplest instances of such contracts would be a contract under which the bankrupt is entitled to a sum of money payable either before or after bankruptcy; the right to the debt passes to the trustee (*Morgan* v. *Taylor* (1859), 28 L. J. (C. P.) 178; *Ex parte Rabbidge, Re Pooley* (1878), 8 Ch. D. 367; *McEntire* v. *Potter & Co.* (1889), 22 Q. B. D. 438).

(*k*) *Gibson* v. *Carruthers* (1841), 8 M. & W. 321, *per* PARKE, B., at p. 333. See *Knight* v. *Burgess* (1864), 33 L. J. (CH.) 727; *Flood* v. *Finlay* (1811), 2 Ball & B. 9.

(*l*) An order with respect to salary or income under a contract for personal services may be made under s. 53 of the Bankruptcy Act, 1883 (46 & 47 Vict. c. 52) (*Re Shine, Ex parte Shine*, [1892] 1 Q. B. 522, *per* BOWEN, L.J., at p. 530).

(*m*) A lease vests in the trustee unless he disclaims (see p. 193, *post*); other contracts which pass to the trustee may be formally disclaimed; if the trustee does not perform his part of the contract in a reasonable time, the other contracting party may treat the contract as abandoned (*Laurence* v. *Knowles* (1839), 5 Bing. (N. C.) 399; *Morgan* v. *Bain* (1874), L. R. 10 C. P. 15; *Ex parte Stapleton, Re Nathan* (1879), 10 Ch. D. 586). As to disclaimer generally see p. 191, *post*.

(*n*) As regards a contract to grant a lease to a bankrupt the trustee may obtain an order for the specific performance of the contract on his agreeing to be personally bound by the covenants into which the bankrupt could have been obliged to enter (*Powell* v. *Lloyd* (1827), 1 Y. & J. 427, on appeal 2 Y. & J. 372, in which the earlier cases to the contrary effect were reviewed and distinguished; see *Buckland* v. *Papillon* (1866), 36 L. J. (CH.) 81; and as to the form of such a lease to the trustee, see *Page* v. *Broom* (1842), 6 Jur. 308). A person to whom the benefit of an agreement for a lease has been assigned by a bankrupt, before he becomes bankrupt, is entitled to specific performance of the agreement, if he is solvent and is willing to enter into the usual covenants, and the agreement was not entered into upon consideration personal to the assignor (*Crosbie* v. *Tooke* (1833), 1 My. & K. 431). But the trustee is not entitled to specific performance of an agreement for a lease which was entered into for the personal accommodation of the bankrupt (*Flood* v. *Finlay* (1811), 2 Ball & B. 9).

SUB-SECT. 2. Available Property in General.

the contract, as and when the bankrupt should have done so himself (*o*).

Where rights qualified by bankruptcy.

267. But, although bankruptcy does not determine a contract if the trustee elects to go on with it, yet in some cases it qualifies the rights to which the trustee succeeds, which are not always the same as the rights of the bankrupt would have been if he had remained solvent (*p*).

Sale of goods.

Thus in the case of a sale of goods to the bankrupt, if both the property in the goods and the possession have passed to the bankrupt, the trustee takes the goods; and, if they have not been paid for, the vendor has no other remedy than to prove in the bankruptcy for the price (*q*). Where the sale is for cash, the seller has in all cases the unpaid seller's lien or right to retain possession until the price is paid, and the bankrupt's trustee is not entitled to the possession of the goods until he pays for them in cash, and the seller can insist on being paid in full as a condition of parting with the possession of the goods. But in the case of the sale of goods on credit, where the possession has not passed to the bankrupt, bankruptcy qualifies the buyer's rights. For if the buyer becomes bankrupt before he has obtained possession of the goods, the seller may refuse to deliver the goods, until they have been paid for in cash (*r*). If part of the goods have been delivered to the buyer before his bankruptcy, the unpaid seller is not after the bankruptcy bound to deliver any more goods until the price of the goods is tendered to him; and if a debt is due to the seller for goods already delivered, he may refuse to deliver any more goods till he is paid the debt already due, as well as the price of the goods delivery of which is desired (*s*).

If a bill of exchange has been given for the price of the goods and the buyer becomes bankrupt, the seller's lien revives (*t*). The lien may also be exercised when there has been a part delivery of the goods (*u*), and although the seller is in possession of the goods as agent or bailee for the buyer (*v*).

(*o*) *Gibson* v. *Carruthers* (1841), 8 M. & W. 321, *per* PARKE, B., at p. 333.

(*p*) See *Re Sneezum, Ex parte Davis* (1876), 3 Ch. D. 463.

(*q*) See *Ex parte Whittaker, Re Shackleton* (1875), 10 Ch. App. 446. As to when the property passes, see the Sale of Goods Act, 1893 (56 & 57 Vict. c. 71), ss. 16, 17, 18. As to when the property passes on a contract to build or manufacture, see *Reid* v. *Macbeth and Gray*, [1904] A. C. 223; *Woods* v. *Russell* (1822), 1 Dow. & Ry. (K. B.) 587; *Clarke* v. *Spence* (1836), 4 Ad. & El. 448; *Laidler* v. *Burlinson* (1837), 2 M. & W. 602; *Tripp* v. *Armitage* (1839), 4 M. & W. 687; *Baker* v. *Gray* (1856), 25 L. J. (C. P.) 161; *Wood* v. *Bell* (1856), 25 L. J. (Q. B.) 321; *Ex parte Watts, Re Attwater* (1862), 32 L. J. (BCY.) 35; *Seath & Co.* v. *Moore* (1886), 11 App. Cas. 350; *Bellamy* v. *Davey*, [1891] 3 Ch. 540). See further the titles BUILDING CONTRACTS ETC.; SALE OF GOODS.

(*r*) Sale of Goods Act, 1893 (56 & 57 Vict. c. 71), s. 55.

(*s*) *Ex parte Chalmers, Re Edwards* (1873), 8 Ch. App. 289.

(*t*) *Gunn* v. *Bolckow, Vaughan & Co.* (1875), 10 Ch. App. 491. See *New* v. *Swain* (1828), 1 Dan. & Ll. 193; *Dixon* v. *Yates* (1833), 5 B. & Ad. 313; *Re Raatz, Ex parte Raatz* (1897), 4 Mans. 127.

(*u*) Sale of Goods Act, 1893 (56 & 57 Vict. c. 71), s. 42; *Miles* v. *Gorton* (1834), 2 Cr. & M. 504.

(*v*) Sale of Goods Act, 1893 (56 & 57 Vict. c. 71), s. 41 (2); *Grice* v. *Richardson* (1877), 3 App. Cas. 319; as to the seller's right of stoppage *in transitu*, see title SALE OF GOODS.

SUB-SECT. 2. Available Property in General.

268. If at the date of the adjudication a right of action is vested in the bankrupt, this right passes to the trustee, unless it is one that touches only the person of the bankrupt (*w*).

Right of action.

SUB-SECT. 3.—*Property devolving on Bankrupt before Discharge.*

Distinction as to property acquired before and after adjudication.

269. The property of the bankrupt divisible amongst his creditors includes not only property which belongs to him at the commencement of the bankruptcy, but also property which may be acquired by or devolve on him before his discharge (*x*). But property which is acquired by or devolves on the bankrupt after his adjudication stands on a different footing from property which belonged to him at or before the date of the adjudication.

All property which belongs to the bankrupt at the commencement of the bankruptcy or between that time and his adjudication, subject to the provisions of the Bankruptcy Act, 1883, as to protected transactions (*y*), vests on the adjudication in the trustee, unless it is property which he can disclaim and it is disclaimed by him, and no claim or intervention on the part of the trustee is necessary to complete his title (*z*).

Intervention of trustee necessary after adjudication.

After the adjudication, if the bankrupt acquires property, he may hold it against all the world except his trustee; when the trustee intervenes, the bankrupt's right is gone (*a*), but before such intervention the bankrupt may, as regards any after-acquired property which is personal estate, including leaseholds, create valid interests in the property, until the trustee intervenes to claim it, and, when the trustee intervenes to claim it, he takes it subject to all rights which have been acquired by third persons *bonâ fide* and for value before his intervention (*b*).

Protection of *bonâ fide* transactions.

270. Until the trustee intervenes, all transactions by a bankrupt after his adjudication with any person dealing with him *bonâ fide* and for value in respect of his after-acquired property other than real estate, with or without knowledge of the bankruptcy, are valid; the trustee, when he intervenes, is bound by such transactions, and

(*w*) As to the principles and cases deciding whether or not a right of action passes to the trustee, see p. 137, *ante*.

(*x*) Bankruptcy Act, 1883 (46 & 47 Vict. c. 52), s. 44 (i.). If an order is made granting a bankrupt his discharge conditional on the payment of a composition, and property devolves on him sufficient to pay the composition and leave a surplus, the surplus, if only sufficient or less than sufficient to pay the creditors in full, is divisible among the creditors, as property devolving on the bankrupt before his discharge; the bankrupt is not entitled to any property which is acquired by or devolves on him before his discharge, except any surplus which remains after paying his creditors in full with interest and the costs, charges and expenses of the bankruptcy proceedings (*Re Hawkins, Ex parte Official Receiver*, [1892] 1 Q. B. 890).

(*y*) See p. 288, *post*.

(*z*) See p. 143, *ante*.

(*a*) *Kitchen* v. *Bartsch* (1805), 7 East, 53.

(*b*) *Webb* v. *Fox* (1797), 7 Term Rep. 391; *Drayton* v. *Dale* (1823), 2 B. & C. 293; *Fyson* v. *Chambers* (1842), 9 M. & W. 460; *Herbert* v. *Sayer* (1844), 5 Q. B. 965; *Morgan* v. *Knight* (1864), 33 L. J. (C. P.) 168; *Jackson* v. *Burnham* (1852), 8 Exch. 173; *Cohen* v. *Mitchell* (1890), 25 Q. B. D. 262; *Re New Land Development Association and Gray*, [1892] 2 Ch. 138; *Re Clark, Ex parte Beardmore*, [1894] 2 Q. B. 393; *Official Receiver* v. *Cooke*, [1906] 2 Ch. 661; *Re Shine, Ex parte Shine*, [1892] 1 Q. B. 522.

SUB-SECT. 3. Property devolving on Bankrupt before Discharge.

by the rights of third persons so acquired (*c*). But if the property consists of a chose in action which has been assigned for value to a person who has not given notice of the assignment, the trustee on intervening may by giving notice acquire priority over such assignee (*d*).

This rule only applies to transactions entered into *bonâ fide* and for value (*e*), but a transaction for value will not be *malâ fide* merely because the person dealing with the bankrupt had knowledge of the bankruptcy and of the ignorance of the trustee that the bankrupt had acquired the property to which the transaction relates (*f*).

Property to which protection applies.

The rule does not apply to real estate (*g*), though it does apply to leaseholds (*h*). Nor does it apply to a second bankruptcy of a bankrupt who has not obtained his discharge; consequently it will not prevent the trustee in the first bankruptcy claiming as

(*c*) *Cohen* v. *Mitchell* (1890), 25 Q. B. D. 262; *Hunt* v. *Fripp*, [1898] 1 Ch. 675; *Re Bennett, Ex parte Official Receiver*, [1907] 1 K. B. 149. Thus money which has been paid away by the bankrupt for value to a third person before the intervention of the trustee cannot be recovered by the trustee, although the person who received the money had notice of the bankruptcy (*Ex parte Dewhurst, Re Vanlohe* (1871), 7 Ch. App. 185); a sum paid away as deposit by the bankrupt, on entering into a contract for the sale of real property which afterwards goes off through his default, belongs to the person to whom it was paid, and not to the trustee, although the trustee had no knowledge of the transaction (*Collins* v. *Stimson* (1883), 11 Q. B. D. 142). Where a husband in his marriage settlement settled furniture on his wife and covenanted that if he brought any additional furniture into the house where his wife lived, such furniture should be bound by the same trusts as the settled furniture, and afterwards became bankrupt and acquired additional furniture, and brought it into the house without his trustee in bankruptcy intervening, it was held that the last-mentioned furniture was bound by the trusts of the settlement, and that the trustee in bankruptcy had no title to it (*Hampton* v. *Lubbock*, [1900] W. N. 18). When a husband had by marriage articles covenanted to settle certain property upon his wife, but did not perform his covenant and became bankrupt, and after his bankruptcy became entitled as the survivor of his wife to certain property belonging to her and this property was claimed on behalf of his creditors, it was held that neither the husband nor his creditors could receive any benefit out of this property, unless and until he performed the obligation imposed upon him by the marriage articles (*Re Smith's Trusts* (1890), 25 L. R. Ir. 439). But if no effectual charge has been created or attempted to be created on after-acquired property, the trustee on intervening takes the property and is not bound by the liabilities which the bankrupt has incurred after the bankruptcy, if the trustee has had no notice of them (*Re Clark, Ex parte Beardmore*, [1894] 2 Q. B. 393, at p. 403, disapproving the opinion of CAVE, J., to the contrary effect in *Re Clark, Ex parte Kearley and the Bankrupt* (1889), 6 Morr. 42, at p. 46).

(*d*) *Mercer* v. *Vans Colina*, [1900] 1 Q. B. 130, n.; *Re Beall, Ex parte Official Receiver*, [1899] 1 Q. B. 688. See title CHOSES IN ACTION.

(*e*) *Re Bennett, Ex parte Official Receiver, supra;* where the administrator of an intestate bankrupt paid away to the bankrupt's next of kin without notice of the bankruptcy the sum received under a policy of insurance on the bankrupt's life, and it was held that the administrator was not liable to the trustee who claimed the sum, but that the next of kin were bound to refund to the trustee what they had received; see *Re Ball*, [1899] 2 Ir. 313.

(*f*) *Hunt* v. *Fripp, supra; Re Bennett, Ex parte Official Receiver, supra.*

(*g*) *Re New Land Development Association and Gray*, [1892] 2 Ch. 138, *per* CHITTY, J., followed in *Bird* v. *Philpott*, [1900] 1 Ch. 822; *London and County Contracts, Ltd.* v. *Tallack* (1903), 51 W. R. 408; *Official Receiver* v. *Cooke*, [1906] 2 Ch. 661.

(*h*) *Re Clayton and Barclay*, [1895] 2 Ch. 212.

SUB-SECT. 3. Property devolving on Bankrupt before Discharge.

against the trustee in the second bankruptcy the after-acquired property of the bankrupt, except when the bankrupt, with the consent of the trustee, carries on trade after the first bankruptcy (*i*); nor to a charge created before the bankruptcy over money that might be earned after the bankruptcy (*j*).

Subsequent trade creditors.

271. If the trustee allows the bankrupt to carry on trade after his bankruptcy, the rights of the creditors under the bankruptcy will be postponed to the rights of subsequent trade creditors of the bankrupt (*k*).

Personal earnings.

272. The personal earnings of a bankrupt earned after his bankruptcy belong to his trustee, except so much of them as is sufficient for the support of the bankrupt and his family (*l*). If such earnings are only sufficient for the support of the bankrupt and his family, the bankrupt can sue for and recover them, and the trustee, even if he intervenes, has no right of action (*m*). But if the earnings are more than sufficient for such support, the surplus belongs to the trustee, if he claims it (*n*). As in the case of other after-acquired property, the bankrupt, if the trustee does not intervene, may sue for and recover his earnings, whatever the amount may be (*o*), but whatever he recovers beyond what is

(*i*) *Re Clark, Ex parte Beardmore*, [1894] 2 Q. B. 393, following *Ex parte Ford, Re Caughey* (1876), 1 Ch. D. 521. See *Ex parte Bourne, Re Bourne* (1826), 2 Gl. & J. 137, at p. 141 ; *Ex parte Butler* (1842), 2 Mont. D. & De G. 731. The trustee in the second bankruptcy will be entitled to the property, if the trustee in the first does not claim it (*Morgan* v. *Knight* (1833), 33 L. J. (C. P.) 168). As against the trustee in the second bankruptcy, the bankrupt can effectually charge the surplus under the first bankruptcy, although at the time of the charge all the debts in the first bankruptcy had not been paid and the surplus had not been ascertained (*Bird* v. *Philpott*, [1900] 1 Ch. 822).

(*j*) *Re Rogers, Ex parte Collins*, [1894] 1 Q. B. 425, at p. 432. In *Re Rogers, Ex parte Woodthorpe* (1891), 8 Morr. 236, at p. 241, CAVE, J., put a further limitation on the rule in *Cohen* v. *Mitchell* (1890), 25 Q. B. D. 262, and said that it was intended to apply to the case of a bankrupt carrying on a business and to protect persons dealing with him in the course of the business, but this limitation is inconsistent with the decision in *Re Bennett, Ex parte Official Receiver*, [1907] 1 K. B. 149. If a bankrupt during his bankruptcy obtains money and thus incurs liability to one creditor and discharges this liability by means of money belonging to him before adjudication, the money so obtained from the creditor cannot be treated as after-acquired property, and if paid away to another creditor can be recovered back by the trustee (*Re Rogers, Ex parte Woodthorpe, supra*).

(*k*) *Troughton* v. *Gitley* (1766), Amb. 630; *Tucker* v. *Hernaman* (1853), 4 De G. M. & G. 395; *Engelback* v. *Nixon* (1875), L. R. 10 C. P. 645. A creditor who merely advances money to a debtor has no lien on the bankrupt's property, but must assert his rights by legal process (*Ex parte Robertson, Re Magnus* (1873), 8 Ch. App. 962), but a person who advances money to an undischarged bankrupt to enable him to purchase property has a lien on the property as against the trustee (*Meux* v. *Smith* (1840), 11 Sim. 410 ; *Bird* v. *Philpott, supra*).

(*l*) *Re Roberts*, [1900] 1 Q. B. 122. See *Re Ebbs* (1886), 19 L. R. Ir. 81.

(*m*) *Williams* v. *Chambers* (1847), 10 Q. B. 337.

(*n*) *Re Roberts, supra ; Re Graydon, Ex parte Official Receiver*, [1896] 1 Q. B. 417.

(*o*) *Chippendall* v. *Tomlinson* (1785), 4 Doug. 318; *Jameson* v. *Brick and Stone Co., Ltd.* (1878), 4 Q. B. D. 208. If the bankrupt is employed by the trustee for the benefit of the estate, and there is evidence of a contract between him and the trustee, he may sue the trustee for his work and labour (*Coles* v. *Barrow* (1813), 4 Taunt. 754).

SUB-SECT. 3. Property devolving on Bankrupt before Discharge.

necessary for the support of himself and his family belongs to the trustee, if the trustee claims it (*p*).

Profits of trade.

The principle that the trustee cannot sue for personal earnings is confined to the proceeds of the bankrupt's personal and daily labour (*q*). It does not apply to the earnings of a bankrupt in a business, even though he would have to use his personal skill in the business (*r*). Although the trustee cannot "let out the bankrupt, cannot contract for his labour" (*s*), and cannot compel the bankrupt to work or earn money (*t*), yet if the bankrupt does actually engage in a trade or occupation producing earnings, whatever he earns beyond what is necessary for the support of himself and his family belongs to the trustee, if he claims it (*a*). If the bankrupt does work as agent for the trustee, the trustee may sue for the price of the work (*b*).

Rights of action.

273. As regards rights of action arising after adjudication in bankruptcy in respect of breaches of contract and wrongs, all such rights of action as pass to a trustee on bankruptcy (*c*) vest in him after bankruptcy. Rights of action which are personal to the bankrupt will not vest. If the trustee does not intervene, the bankrupt may sue and recover (*d*), but the amount which is recovered, if in respect of a right of action that would pass, would be subject to the right of the trustee to claim the proceeds (*e*), and it is submitted that even in the case of rights of action which do not pass, if the amount recovered is more than sufficient for the support of the bankrupt and his family, the surplus is subject to the claim of the trustee, if he intervenes (*f*).

(*p*) *Re Roberts*, [1900] 1 Q. B. 122.

(*q*) *Kitson* v. *Hardwick* (1872), L. R. 7 C. P. 473, at p. 479; see *Hesse* v. *Stevenson* (1803), 3 Bos. & P. 565, at p. 578; *Shoolbred* v. *Roberts*, [1899] 2 Q. B. 560, at p. 563.

(*r*) *Re Rogers, Ex parte Collins*, [1894] 1 Q. B. 425. It has been held that the rule that the trustee cannot sue for personal earnings does not apply to the case of a furniture broker who removed goods, employed men and vans, supplied packing cases, and repaired furniture (*Crofton* v. *Poole* (1830), 1 B. & Ad. 568), or a general medical practitioner (*Elliot* v. *Clayton* (1851), 20 L. J. (Q. B.) 217), or a painter who used his personal labour, paid for wages of workmen and supplied materials (*Re Dowling, Ex parte Banks* (1877), 4 Ch. D. 689), or an architect who prepared plans and specifications and employed clerks (*Emden* v. *Carte* (1881), 17 Ch. D. 169, and on appeal 768), or a surgeon-dentist (*Re Rogers, Ex parte Collins*, [1894] 1 Q. B. 425), or a person who earned commission by negotiating the sale of a public-house (*Mercer* v. *Vans Colina*, [1900] 1 Q. B. 130, n.). In *Shoolbred* v. *Roberts*, *supra*, it was held that the trustee was entitled to recover the winnings of a bankrupt at a billiard match played by him, and that as between the bankrupt and the trustee the bankrupt could not set up the defence of illegality. On the other hand, an opinion has been expressed in Ireland that money earned by a solicitor and election agent is personal earnings under the Act in force there (*Re Ebbs* (1886), 19 L. R. Ir. 81).

(*s*) *Chippendall* v. *Tomlinson* (1785), 4 Doug. 318.

(*t*) *Bailey* v. *Thurston & Co., Ltd.*, [1903] 1 K. B. 137, at p. 145.

(*a*) *Re Roberts, supra; Re Graydon, Ex parte Official Receiver*, [1896] 1 Q. B. 417.

(*b*) *Whitmore* v. *Gilmour* (1844), 12 M. & W. 808.

(*c*) See p. 136, *ante*.

(*d*) *Bailey* v. *Thurston & Co., Ltd.*, *supra* (action for wrongful dismissal after bankruptcy under a contract made before bankruptcy).

(*e*) *Wadling* v. *Oliphant* (1875), 1 Q. B. D. 145 (wrongful dismissal).

(*f*) *Re Roberts, supra*.

SUB-SECT. 3. Property devolving on Bankrupt before Discharge.

Intervention after action brought.

If the bankrupt has commenced an action before the trustee intervenes and the right of action is one that passes on bankruptcy, and the trustee intervenes during the course of the action, the proper course is to add the trustee as plaintiff and to give him the conduct of the action (*g*). If the bankrupt has brought an action and recovered judgment and the trustee then intervenes before the bankrupt has disposed of or charged the judgment debt, the judgment debt thereupon vests in the trustee, and the bankrupt can take no further proceedings in respect of the debt (*h*).

SUB-SECT. 4.—*Trust Property*

Property held on trust.

274. The Bankruptcy Act, 1883, specially provides that the property of the bankrupt divisible among his creditors does not include property held by the bankrupt on trust for any other person (*i*). The reason for this enactment is that property held by a bankrupt on trust for another person is not a beneficial interest of the bankrupt, and is not, therefore, property which, according to the general principles of bankruptcy law, could be divisible among his creditors (*j*). When a bankrupt holds property on trust for other persons and has no beneficial interest in it, he has only a legal estate which has none of the qualities of property divisible among creditors (*k*); if he holds property on trust for himself and other persons, then the beneficial interest which he has in that property is divisible among his creditors (*l*).

Property held by the bankrupt as executor or administrator or in any fiduciary capacity is property held on trust within the meaning of the Bankruptcy Act, 1883 (*m*). Money held by a person in a

(*g*) *Emden* v. *Carte* (1881), 17 Ch. D. 169.

(*h*) *Ex parte Carter, Re Carter* (1876), 2 Ch. D. 806. See *Cohen* v. *Mitchell* (1890), 25 Q. B. D. 262.

(*i*) Bankruptcy Act, 1883 (46 & 47 Vict. c. 52), s. 44 (1).

(*j*) See *Smith* v. *Coffin* (1795), 2 Hy. Bl. 444; *Gibson* v. *Carruthers* (1841), 8 M. & W. 321, at p. 333; *Ex parte Gennys, Re Elford* (1829), Mont. & M. 258; *Boddington* v. *Castelli* (1853), 1 E. & B. 879; *Winch* v. *Keeley* (1787), 1 Term Rep. 619.

(*k*) *Scott* v. *Surman* (1743), Willes, 400, at p. 402.

(*l*) It is doubtful whether in cases where the bankrupt has a beneficial interest, and is also a trustee, the legal estate does or does not pass; where there is an express trust, it seems that the legal estate does not pass, see Lewin on Trusts, 11th ed. 265; where the trust is an implied or constructive one, the legal estate may pass to the trustee in bankruptcy, who will hold as trustee for the creditors and the other persons interested, see *Carvalho* v. *Burn* (1833), 4 B. & Ad. 382, at p. 393; affirmed in Exchequer Chamber *sub nom. Burn* v. *Carvalho* (1834), 1 Ad. & El. 883, at p. 893.

(*m*) If an executor carries on the trade of his testator under the directions of the testator's will, though he is personally liable for debts so incurred, he has a right to be indemnified for such debts out of the assets of the testator (*Dowse* v. *Gorton*, [1891] A. C. 190); this gives him a lien on the assets of the business, and such lien passes to his trustee in bankruptcy (*Jennings* v. *Mather*, [1902] 1 K. B. 1); but if the executor is in default, he is not entitled to an indemnity, except on the terms of making good his default, and his creditors will be in no better position (*Re Johnson* (1880), 15 Ch. D. 548); if one of several executors is in default, the executors who are not in default are entitled to an indemnity (*Re Frith*, [1902] 1 Ch. 342).

fiduciary position is considered to belong to the person for whom he holds it (*n*).

Right to follow trust property.

275. If the trust property is disposed of by a trustee, the proceeds of the disposition may be followed and claimed by the *cestui que trust*, if they can be identified (*o*). The same rule applies if the trust property has been changed into money, and the money can be ear-marked (*p*). If the trustee has mixed trust money or the proceeds of the disposition of trust property with his own money, then, so long as the trust property can be traced and identified, the *cestui que trust* has a charge on the mixed fund (*q*). If a trustee pays trust money to his account at his bankers' and mixes it with his own money, and afterwards draws out sums by cheques in the ordinary manner, the rule (*r*) attributing the first drawings out to the first payments in does not apply, and the drawer will be taken to have drawn out his own money in preference to the trust money, and any balance remaining will be held to belong to the trust (*s*).

Property in possession of factor.

276. A factor or mercantile agent intrusted with the possession as well as the disposal of goods is a trustee of such goods, and they will not on his bankruptcy pass to his trustee, but will belong to his principal (*t*). But the factor has a general lien on them for any debts due to him from the principal on the general account between them, and this lien passes to the trustee in bankruptcy of the factor (*a*).

(*n*) *Pennell* v. *Deffell* (1853), 4 De G. M. & G. 372; *Re Hallett* (1879), 13 Ch. D. 696; *Ex parte Hardcastle, Re Mawson* (1881), 44 L. T. 523.

(*o*) *Taylor* v. *Plumer* (1815), 3 M. & S. 562, at p. 574; *Frith* v. *Cartland* (1869), 2 H. & M. 417; *Pinkett* v. *Wright* (1842), 2 Hare, 120; *Ex parte Cooke, Re Strachan* (1876), 4 Ch. D. 123; *Harris* v. *Truman* (1882), 9 Q. B. D. 264; *Gibert* v. *Gonard* (1885), 52 L. T. 54. The same principle applies to property bought with stolen money (*Re Hulton, Ex parte Manchester and County Bank* (1891), 8 Morr. 69).

(*p*) *Tooke* v. *Hollingworth* (1793), 5 Term Rep. 215, at p. 227.

(*q*) *Re Hallett, supra*, per JESSEL, M.R., at pp. 708, 709.

(*r*) *Clayton's Case* (1816), 1 Mer. 572.

(*s*) *Re Hallett, supra; Re Ulster Building Co., Ex parte Fitzsimon* (1889), 25 L. R. Ir. 24, at p. 29; *Re Oatway*, [1903] 2 Ch. 356. See *Re Hallett & Co., Ex parte Blane*, [1894] 2 Q. B. 237, where it was held that when, on the settlement of accounts, the trustee was credited with the amount of a payment by him, this did not amount to a payment of trust money which could be followed. As to the liabilities of bankers when they have notice that an account is a trust account, see *Ex parte Kingston, Re Gross* (1871), 6 Ch. App. 632; *Coleman* v. *Bucks and Oxon Union Bank*, [1897] 2 Ch. 243; and see title BANKERS AND BANKING, Vol. I., p. 584.

(*t*) *Godfrey* v. *Furzo* (1733), 3 P. Wms. 185; *Ex parte Dumas* (1754), 2 Ves. Sen. 582, 585. Brokers, *i.e.*, mercantile agents who are employed to sell goods without being put in possession of goods, may, as regards money which they receive, be in the position of trustees. A broker who is instructed to sell stock and invest the proceeds in a specified way is an agent into whose hands money is put to be applied in a particular way, and in such cases money paid to him can be followed by a customer (*Ex parte Cooke, Re Strachan* (1876), 4 Ch. D. 123). Where the account is a speculative one, the relation may be merely that of creditor and debtor, and in such a case money in the hands of the broker would pass on his bankruptcy to his trustee (*King* v. *Hutton*, [1900] 2 Q. B. 504). See further title AGENCY, Vol. I., p. 203.

(*a*) As to factor's lien, see *Drinkwater* v. *Goodwin* (1775), 1 Cowp. 251; *Frith* v. *Forbes* (1862), 4 De G. F. & J. 409; *Brown, Shipley & Co.* v. *Kough* (1885),

SUB-SECT. 4. **Trust Property.**

Sale by factor.

If goods are sold by a factor, the price belongs to the principal, subject to the factor's lien, and if the principal for whom the factor has sold goods becomes bankrupt, the factor is entitled to his lien as against the principal's trustee in bankruptcy (*b*). If the factor receives the price of the goods and becomes bankrupt, the purchase-money or its proceeds, if they can be identified, will be the property of the principal, and will not pass to the factor's trustee (*c*), except where the money has been mixed with the factor's money and is indistinguishable (*d*).

A person who receives goods from another and sells them at any price he likes to be paid at any time he likes, while he is bound to pay to the consignor a fixed price at a fixed time, sells the goods on his own account, even though he describes himself as agent, and the purchase-money cannot be followed by the consignor, but passes to the trustee of the person who so sells (*e*).

Property intrusted for specific purpose.

277. Property which is in the possession of the bankrupt for a specific purpose does not, as a general rule, pass to the trustee, but is clothed with a species of trust and is subject to the same principles as trust property (*f*).

If bills of exchange and promissory notes, which are ordinarily delivered and remitted as cash, are specifically appropriated to a particular purpose, the owner will be entitled to have the bills or notes restored to him, if they remain in the bankrupt's hands at the time of bankruptcy, or to the money received upon them, if the trustee in bankruptcy disposes of them (*g*).

29 Ch. D. 848; *Stevens* v. *Biller* (1883), 25 Ch. D. 31; *Mildred* v. *Maspons* (1883), 8 App. Cas. 874. See further titles AGENCY, Vol. I., pp. 197 *et seq.*, and BAILMENT, Vol. I., pp. 547 *et seq.*

(*b*) *Drinkwater* v. *Goodwin* (1775), 1 Cowp. 251.

(*c*) *Taylor* v. *Plumer* (1815), 3 M. & S. 562; *Harris* v. *Truman* (1882), 9 Q. B. D. 264.

(*d*) *Taylor* v. *Plumer*, *supra*, at p. 575. If the money has been paid into a bank, it may be treated in the same way as trust money; see p. 169, *ante*.

(*e*) *Ex parte White*, *Re Nevill* (1871), 6 Ch. App. 397, affirmed in House of Lords, *sub nom. John Towle & Co.* v. *White* (1873), 29 L. T. 78. It is a question of fact whether a person sells as agent or as principal. There is nothing to prevent the principal from remunerating the agent by a commission varying according to the amount of the profit obtained by the sale, or to prevent his paying a commission depending upon the surplus which the agent can obtain over and above the price which will satisfy the principal; the amount of the commission does not turn the agent into a purchaser (*Ex parte Bright*, *Re Smith* (1879), 10 Ch. D. 566, *per* JESSEL, M.R., at p. 570). See generally, title AGENCY, Vol. I.

(*f*) *Ex parte Waring*, *Inglis*, *Clarke* (1815), 19 Ves. 345; *Ex parte Smith* (1835), 4 Deac. & Ch. 579; *Ex parte Brown*, *Re Warwick* (1838), 3 Mont. & A. 471; *Steele* v. *Stuart* (1866), L. R. 2 Eq. 84; *Ex parte Angerstein*, *Re Angerstein* (1874), 22 W. R. 581; *Re Rogers*, *Ex parte Holland & Hannen* (1891), 8 Morr. 243; *Re Drucker* (No. 1), *Ex parte Basden*, [1902] 2 K. B. 237; *Re Gothenburg Commercial Co., Ltd.* (1881), 29 W. R. 358. The trustee in bankruptcy will not be personally liable in respect of property received by the bankrupt for a specific purpose, unless it is shown that the property came into the trustee's possession with a knowledge of the purposes for which it was destined (*Kieran* v. *Johnson* (1815), 1 Stark. 109).

(*g*) *Ex parte Smith*, *Re Power and Warwick* (1819), Buck, 355; *Tooke* v. *Hollingworth* (1793), 5 Term Rep. 215; *Ex parte Bond*, *Re Forster* (1840), 1 Mont. D. & De G. 10; *Ex parte Atkins* (1842), 3 Mont. D. & De G. 103; *Ex parte Imbert*, *Re Latham* (1857), 1 De G. & J. 152; *Re Broad*, *Ex parte Neck*

Short bills.

278. Short or undue bills which are remitted by a customer to a banker, and which are not carried by the banker to the credit of the customer until the proceeds are received, will not, if undisposed of before bankruptcy, pass on the banker's bankruptcy to the trustee, but will belong to the customer subject to the banker's lien, being treated as sent to the banker merely for the purpose of obtaining payment when due (*h*).

If there is a contract express or implied between the banker and the customer that short bills transmitted by the customer should be treated as cash, they will, on the banker's bankruptcy, belong to the trustee (*i*).

Insolvency of both banker and customer.

If both the customer and the banker are insolvent and the customer has deposited with the banker bills or goods to cover his acceptances, the holder of the acceptances will be entitled to have the bills or goods applied in the discharge of such acceptances (*k*), not because the holder of the bills has any lien on the bills or goods deposited with the banker or any equity to have them so applied, but in order to work out the equities between the two insolvent estates (*l*).

(1884), 13 Q. B. D. 740; *Ex parte Dever, Re Suse* (1884), 13 Q. B. D. 766; *Phelps, Stokes & Co.* v. *Comber* (1885), 29 Ch. D. 813; *Ex parte Gomez, Re Yglesias* (1875), 10 Ch. App. 639; *Re Brown, Ex parte Plitt* (1889), 6 Morr. 81.

(*h*) *Ex parte Sellers* (1811), 18 Ves. 229; *Ex parte Pease, Re Boldero* (1812), 1 Rose, 232; *Thompson* v. *Giles* (1824), 2 B. & C. 422; *Ex parte Barkworth, Re Harrison* (1858), 2 De G. & J. 194; *Re Mills, Bawtree & Co., Ex parte Stannard* (1893), 10 Morr. 193. If the banker discounts a bill of this kind, or advances money upon it, he will be entitled in the one case to the whole property in the bill, in the other to a lien on it for the advance (*Giles* v. *Perkins* (1807), 9 East, 12, at p. 14; *Carstairs* v. *Bates* (1813), 3 Camp. 301; *Ex parte Pease, Re Boldero* (1812), 1 Rose, 232; *Ex parte Benson, Re Dilworth* (1832), Mont. & B. 120; *Hornblower* v. *Proud* (1819), 2 B. & Ald. 327; *Ex parte M'Gae* (1816), 19 Ves. 607). See generally title BANKERS AND BANKING, Vol. I., pp. 598, 622, 629.

(*i*) *Ex parte Waring, Inglis, Clarke* (1815), 19 Ves. 345.

(*k*) This is known as the "rule in *Waring's Case*." See also *Ex parte Dever, Re Suse* (No. 2) (1885), 14 Q. B. D. 611, *per* BRETT, M.R., at p. 620: "Where as between the drawer and acceptor of a bill of exchange, a security has, by virtue of a contract between them, been specifically appropriated to meet that bill at maturity, and has been lodged for that purpose by the drawer with the acceptor, then, if both drawer and acceptor become insolvent and their estates are brought under a forced administration, the bill-holder, though neither party nor privy to the contract, is entitled to have the specifically appropriated security applied in or towards payment of the bill." As to the application of the rule see *Powles* v. *Hargreaves* (1853), 3 De G. M. & G. 430; *Re New Zealand Banking Corporation, Hickie & Co.'s Case* (1867), L. R. 4 Eq. 226; *Royal Bank of Scotland* v. *Commercial Bank of Scotland* (1882), 7 App. Cas. 366, where the rule was criticised; *Re Barned's Banking Co., Ex parte Joint Stock Discount Co.* (1875), 10 Ch. App. 198; *Ex parte General South American Co., Re Yglesias* (1875), 10 Ch. App. 635; *Ex parte Gomez, Re Yglesias* (1875), 10 Ch. App. 639; *Ex parte Lambton, Re Lindsay* (1875), 10 Ch. App. 405; *Trimingham* v. *Maud* (1868), L. R. 7 Eq. 201; *Re New Zealand Banking Corporation, Levi & Co.'s Case* (1869), L. R. 7 Eq. 449; *City Bank* v. *Luckie* (1870), 5 Ch. App. 773; *Re General Rolling Stock Co., Ex parte Alliance Bank* (1869), 4 Ch. App. 423; *Re Joint Stock Discount Co., Loder's Case* (1868), L. R. 6 Eq. 491; *Ex parte Banner, Re Tappenbeck* (1876), 2 Ch. D. 278; *Ex parte Smart, Re Richardson* (1872), 8 Ch. App. 220; *Ex parte Dewhurst, Re Leggatt, Re Gledstanes* (1873), 8 Ch. App. 965; *Vaughan* v. *Halliday* (1874), 9 Ch. App. 561; *Re Entwistle, Ex parte Arbuthnot* (1876), 3 Ch. D. 477.

(*l*) *Ex parte Sargeant, Re Burrough* (1810), 1 Rose, 153; see *Thompson* v.

SUB-SECT. 4. Trust Property.

Bank post bills.

The principles applicable to short bills are also applicable to a "bank post bill" (*m*) and to all cases where undue bills are remitted from one person to another; if the purpose for which the bills are remitted is not answered, but the remittee carries the bills to account and becomes bankrupt, the property in the bills remains in the person making the remittances and does not pass to the trustee, unless there is a contract express or implied that the bills should be treated by the bankrupt as his own property (*n*).

Advances etc. for specific purpose.

279. If goods or bills are consigned or remitted to an agent subject to a contract for valuable consideration between the consignor or remitter and a third person that they shall be specifically applied for the benefit of such third person by the consignee or remittee, this will amount to a trust for the benefit of the third person (*o*). And if a person obtains an advance of money under an agreement that goods in the hands of his agent or correspondent abroad or the proceeds of them shall be specifically appropriated for the payment of the advances, the security thus given cannot be recalled (*p*).

Conveyance without knowledge of creditors.

If a man without any communication with his creditors conveys property to trustees for the purpose of paying his debts, this does not create a trust for the creditors, and the deed of conveyance will be revocable (*q*), unless one or more creditors assent to it, in which case it will be irrevocable (*r*).

Giles (1824), 2 B. & C. 422; *Ex parte Barkworth, Re Harrison* (1858), 2 De G. & J. 194; *Ex parte Bond, Re Forster* (1840), 1 Mont. D. & De G. 10; *Ex parte Armitstead* (1827-8), 2 Gl. & J. 371; *Ex parte Benson, Re Dilworth* (1832), Mont. & B. 120; *Ex parte Twogood* (1812), 19 Ves. 229; *Ex parte Leeds Bank, Re Boldero* (1812), 1 Rose, 254; *Ex parte Thompson, Re Dilworth* (1828), Mont. & M. 102; *Ex parte Edwards* (1842), 2 Mont. D. & De G. 625.

(*m*) *Ex parte Atkins* (1842), 3 Mont. D. & De G. 103.

(*n*) *Jombart* v. *Woollett* (1837), 2 My. & Cr. 389; *Ex parte Smith, Re Power and Warwick* (1819), Buck, 355; *Re Douglas, Ex parte Hankey* (1838), 1 Mont. & Ch. 1; *Ex parte Frere, Re Sikes & Co.* (1829), 1 Mont. & M. 263; *Buchanan* v. *Findlay* (1829), 9 B. & C. 738; *Bent* v. *Puller* (1794), 5 Term Rep. 494; *Ex parte Imbert, Re Latham* (1857), 1 De G. & J. 152; *Re Brown, Ex parte Plitt* (1889), 6 Morr. 81; *Ex parte Gledstanes* (1842), 3 Mont. D. & De G. 109; *Ex parte Flower* (1835), 4 Deac. & Ch. 449; *Ex parte Cotterell* (1837), 3 Deac. 12; *Sadler* v. *Belcher* (1843), 2 Moo. & R. 489.

(*o*) *Ex parte Imbert, Re Latham* (1857), 1 De G. & J. 152; but see *Thomson* v. *Simpson* (1870), 5 Ch. App. 659; *Citizens' Bank of Louisiana* v. *First National Bank of New Orleans* (1873), L. R. 6 H. L. 352.

(*p*) *Fisher* v. *Miller* (1823), 1 Bing. 150; *Burn* v. *Carvalho* (1839), 4 My. & Cr. 690; *Bailey* v. *Culverwell* (1828), 8 B. & C. 448. Compare *Ex parte Angerstein, Re Angerstein* (1874), 22 W. R. 581, where a father, having power to appoint a fund among his children, agreed with one of his sons to appoint a portion of the fund equal to the amount of his debts in his favour on the understanding that the sum to be appointed should be applied in repaying the amount to the father, who had paid the debts, and it was held that the appointed sum was specifically appropriated and did not pass to the trustee of the appointee, though the appointment was made after the son had committed an act of bankruptcy.

(*q*) *Smith* v. *Keating* (1848), 6 C. B. 136; *Johns* v. *James* (1878), 8 Ch. D. 744; *Re Ashby, Ex parte Wreford*, [1892] 1 Q. B. 872; see *Griffith* v. *Ricketts, Griffith* v. *Lunell* (1849), 7 Hare, 299. But such a deed, if for the benefit of creditors generally and comprising all the debtor's property, will be an act of bankruptcy. See p. 14, *ante*.

(*r*) *Johns* v. *James* (1878), 8 Ch. D. 744; *Siggers* v. *Evans* (1855), 5 E. & B. 367.

SUB-SECT. 5.—*Reputed Ownership.*

SUB-SECT. 5. Reputed Ownership.

280. The property of the bankrupt divisible among his creditors comprises all goods which at the commencement of the bankruptcy are in the possession, order or disposition of the bankrupt, in his trade or business, by the consent and permission of the true owner, under such circumstances that he is the reputed owner thereof; but things in action other than debts due or growing due to the bankrupt in the course of his trade and business are not goods within the meaning of this provision (*s*). This provision is directed against a false credit obtained by a person carrying on a trade or business from the visible possession of property to which he is not entitled (*a*), and its effect is to transfer to the trustee certain property which does not belong to the bankrupt at all or in which he has only a qualified interest. In order that property may come within this provision the following conditions must be satisfied:—

Goods in order and disposition of bankrupt.

281. The bankrupt must be carrying on a trade or business. The term "business" is wider in its application than the term "trade" (*b*). An isolated business transaction does not constitute carrying on a business. A person carries on a trade or business when he has an intention of gaining and continuing to gain his livelihood by it (*c*).

Bankrupt must be carrying on trade or business.

282. The property must be goods, that is, personal chattels (*d*), or choses in possession, and debts due or growing due to the bankrupt

Property must be goods or trade debts.

(*s*) Bankruptcy Act, 1883 (46 & 47 Vict. c. 52), s. 44 (iii.).

(*a*) *Freshney* v. *Wells* (1857), 26 L. J. (C. P.) 129, *per* MARTIN, B., at p. 130; *Ryall* v. *Rowles* (1749), 1 Ves. Sen. 348, at p. 372; *Joy* v. *Campbell* (1804), 1 Sch. & Lef. 328, 336. All the Bankruptcy Acts from 21 Jac. 1, c. 19, onwards have contained provisions (viz., 21 Jac. 1, c. 19, s. 11; 6 Geo. 4, c. 16, s. 72; 12 & 13 Vict. c. 106, s. 125; 32 & 33 Vict. c. 71, s. 15) as to goods in the reputed ownership of the bankrupt.

(*b*) See *Harris* v. *Amery* (1865), 35 L. J. (C. P.), *per* WILLES, J., at p. 92; but see *Delany* v. *Delany* (1885), 15 L. R. Ir., *per* CHATTERTON, V.-C., at p. 67. As to the meaning of the term "business" in covenants against carrying on a business, see *Doe* v. *Keeling* (1813), 1 M. & S. 95; *Brammell* v. *Lacy* (1879), 10 Ch. D. 691; *Rolls* v. *Miller* (1883), 25 Ch. D. 206; S.C. (1884) 27 Ch. D. 71. As to the meaning of "business" in s. 4 of the Companies Act, 1862 (25 & 26 Vict. c. 89), see *Smith* v. *Anderson* (1880), 15 Ch. D. 247; *Re Arthur Average Association for British, Foreign, and Colonial Ships, Ex parte Hargrove & Co.* (1875), 10 Ch. App. 542; *Re Padstow Total Loss and Collision Assurance Association* (1882), 20 Ch. D. 137; *Jennings* v. *Hammond* (1882), 9 Q. B. D. 225; *Shaw* v. *Benson* (1883), 11 Q. B. D. 563; *Re Thomas, Ex parte Poppleton* (1884), 14 Q. B. D. 379; *Re Siddall* (1885), 29 Ch. D. 1; *Reg.* v. *Tankard*, [1894] 1 Q. B. 548.

(*c*) *Ex parte Board of Trade, Re Mutton* (1887), 19 Q. B. D. 102; *Re Griffin, Ex parte Board of Trade* (1890), 8 Morr. 1. A person who occupies a country house and land attached, and engages in farming and market gardening for his own pleasure, does not carry on a "trade or business" within the meaning of s. 44 (iii.) of the Bankruptcy Act, 1883 (46 & 47 Vict. c. 52) (*Re Wallis, Ex parte Sully* (1885), 14 Q. B. D. 950). A lodging-house keeper, who supplies lodgings, but not board, carries on a "trade or business" within the meaning of the Act (*Re Harrison, Ex parte Official Receiver* (1892), 10 Morr. 1); so, it seems, does an artist who hires a room for the purpose of exhibiting his pictures with a view to selling them, see *Re Cook, Ex parte Dudgeon* (1884), 1 Morr. 108. As to the application of the doctrine of reputed ownership to farmers, see title AGRICULTURE, Vol. I., p. 276.

(*d*) Bankruptcy Act, 1883 (46 & 47 Vict. c. 52), s. 168 (1). Ships come within

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in the course of his trade or business (*e*). No interest in land is within the reputed ownership clause (*f*); and therefore fixtures are not within it (*g*), nor debts secured by a mortgage on land (*h*). No choses in action are within the provision except debts due or growing due to the bankrupt in the course of his trade or business (*i*).

Goods must be in possession etc. of bankrupt.

283. The goods or debts must be in the possession, order, or disposition of the bankrupt or his agent (*k*).

the clause (*Stephens* v. *Sole* (1736), cited 1 Ves. Sen. at p. 352; *Hay* v. *Fairbairn* (1818), 2 B. & Ald. 193; *Monkhouse* v. *Hay* (1820), 2 Brod. & Bing. 114).

(*e*) *Colonial Bank* v. *Whinney* (1885), 30 Ch. D. 261, *per* COTTON, L.J., at p. 274.

(*f*) *Roe* v. *Galliers* (1787), 2 Term Rep. 133, *per* BULLER, J., at p. 139. If land and personal chattels are leased together as one subject-matter at one entire rent, and the trustee disclaims the lease, he cannot claim the chattels under the doctrine of reputed ownership (*Ex parte Allen, Re Fussell* (1882), 20 Ch. D. 341).

(*g*) *Horn* v. *Baker* (1808), 2 Smith, L. C., 11th ed. 232.

(*h*) *Ex parte Mackay* (1841), 1 Mont. D. & De G. 550.

(*i*) Shares in an incorporated company transferable only by deed are things in action, and are not affected by the reputed ownership clause (*Colonial Bank* v. *Whinney* (1886), 11 App. Cas. 426). Sums retained by bankers against acceptances, and for which they have given "marginal notes," are not "debts due" to the bankrupt, because, until the bankers receive intelligence that the bills have been duly paid, it is wholly uncertain whether any sum would be payable to the bankrupt (*Ex parte Kemp, Re Fastnedge* (1874), 9 Ch. App. 383). If a furniture dealer is in the habit of letting out furniture on the hire system, a sum due under a hiring agreement is a debt due to the bankrupt in the course of his trade (*Re Davis & Co., Ex parte Rawlings* (1888), 60 L. T. 156).

(*k*) Actual possession by the bankrupt is not necessary; it is sufficient if the goods are in the possession of a servant of the bankrupt (*Jackson* v. *Irvin* (1809), 2 Camp. 48), or his agent and salaried manager, even although he has a right of lien (*Hoggard* v. *Mackenzie* (1858), 25 Beav. 493), or his wife if she is carrying on the business with his authority (*Ex parte Shuttleworth* (1832), 1 Deac. & Ch. 223). If the goods have been let out by the bankrupt for hire, they may still be in his possession, order or disposition (*Hornsby* v. *Miller* (1858), 1 E. & E. 192; *Ex parte Roy, Re Sillence* (1877), 7 Ch. D. 70). But where the bankrupt pledged goods which were in a warehouse of a third party and deposited the warrants with the pledgee, it was held that the bankrupt was not in possession of the goods (*Greening* v. *Clark* (1825), 4 B. & C. 316). If the pledgee of goods has the goods and is entitled to retain possession of them to the exclusion of the pledgor, the goods are not in the possession of the pledgor (*Webb* v. *Whinney* (1868), 16 W. R. 973; see *Colonial Bank* v. *Whinney* (1886), 11 App. Cas. 426). If certain creditors claim a lien on the goods of the bankrupt which are by agreement with the rest of the creditors placed in the hands of third persons to sell them, the claim to a lien on them being referred to arbitration, the goods are not in the possession etc. of the bankrupt (*Tatham* v. *Andree* (1863), 1 Moo. P. C. C. (N. S.) 386). But goods which are in the possession of a lien creditor of the bankrupt may yet, subject to the lien, be also in the possession of the bankrupt for the purposes of the reputed ownership clause (*Ex parte Arbouin, Ex parte Gonne* (1846), De G. 359). Goods seized by the sheriff or by the landlord under a distress for rent are not in the bankrupt's possession etc. (*Fletcher* v. *Manning* (1844), 12 M. & W. 571; *Sacker* v. *Chidley* (1865), 11 Jur. (N. S.) 654). The possession of a receiver appointed by the court takes the goods out of the bankrupt's possession (*Taylor* v. *Eckersley* (1877), 5 Ch. D. 740). But an unlawful seizure by the sheriff or other person does not take the goods out of the possession etc. of the bankrupt (*Barrow* v. *Bell* (1855), 5 E. & B. 540; *Ex parte Foss, Re Baldwin* (1858), 2 De G. & J. 230; *Ex parte Edey, Re Cuthbertson* (1875), L. R. 19 Eq. 264); and so where it is concealed from the world that an execution is levied and the execution creditor leaves a man in possession for a considerable time (five months) and permits the

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The goods or debts must be in the possession, order or disposition of the bankrupt at the commencement of his bankruptcy. If they come into his possession, order or disposition after the commencement of the bankruptcy, they do not vest in the trustee (*l*).

At commencement of bankruptcy.

The goods or debts must be in the possession, order or disposition of the bankrupt in his trade or business. It is not necessary that the goods should be stock-in-trade or things which may be sold or pledged in the trade or business; but they must be goods which are used for the purposes of or purposes connected with the trade or business (*m*); goods which are not so used (*n*), and debts which have no connection with the trade or business (*o*), do not pass to the trustee under this clause.

Goods must be used for business purposes.

The goods or debts must be in the possession, order or disposition of the bankrupt by the consent and permission of the true owner (*p*). There must be a real owner distinct from an apparent owner, and the real owner must consent to the apparent ownership as such (*q*). If the bankrupt is a trustee and the goods are trust property, the reputed ownership clause has no application, as the bankrupt is the true owner, and the true owner and the reputed owner are the same persons and the possession is in accordance with the title (*r*).

Consent of true owner.

bankrupt to carry on business and to act as the visible owner of the goods, the case is within the mischief of the provisions relating to reputed ownership, and the goods pass to the trustee (*Toussaint* v. *Hartop* (1816), Holt (N. P.) 335). The goods must be in the possession of the bankrupt alone; if they are in the joint possession of the bankrupt and another person who is solvent, the reputed ownership clause does not apply (*Ex parte Dorman, Re Lake* (1872), 8 Ch. App. 51; *Re Bainbridge, Ex parte Fletcher* (1878), 8 Ch. D. 218). As to reputed ownership in the case of partners, see *Ex parte Hayman, Re Pulsford* (1878), 8 Ch. D. 11; *Reynolds* v. *Bowley* (1867), L. R. 2 Q. B. 474; *Graham* v. *McCulloch* (1875), L. R. 20 Eq. 397; *Re Crouch, Ex parte Smith* (1901), 83 L. T. 746. Goods which are left for merely a temporary custody are not in the possession, order or disposition of the bankrupt (*Re Flyn* (1748), 1 Atk. 185; see *Re M'Parland, Ex parte Murphy* (1893), 31 L. R. Ir. 465). Debts are in the order and disposition of the bankrupt until they are assigned to another person and notice of the assignment is given to the debtor (*Gardner* v. *Lachlan* (1838), 4 My. & Cr. 129, *per* COTTENHAM, L.C., at p. 131; *Cooke* v. *Hemming* (1868), L. R. 3 C. P. 334, at p. 342; *Re Tillett, Ex varte Kingscote* (1889), 6 Morr. 70).

(*l*) *Lyon* v. *Weldon* (1824), 2 Bing. 334; *The Ruby* (1900), 83 L. T. 438. As to what is the commencement of the bankruptcy, see p. 181, *post*.

(*m*) *Colonial Bank* v. *Whinney* (1885), 30 Ch. D. 261, *per* LINDLEY, L.J., at p. 281, reversed on another point, 11 App. Cas. 426. In *Sharman* v. *Mason*, [1899] 2 Q. B. 679, it was held that stands used by a mantle-maker to show off mantles were in the possession of the bankrupt in her trade or business.

(*n*) *E.g.*, pictures in the warehouse and counting-house of a firm of woollen manufacturers, see *Ex parte Lovering, Re Murrell* (1883), 24 Ch. D. 31; compare *Ex parte Emerson, Re Hawkins* (1871), 41 L. J. (BCY.) 20 (chattels hired under hire-purchase agreement).

(*o*) *Re Pryce, Ex parte Rensburg* (1877), 4 Ch. D. 685; *Re Jenkinson, Ex parte Nottingham and Nottinghamshire Bank* (1885), 15 Q. B. D. 441.

(*p*) *Joy* v. *Campbell* (1804), 1 Sch. & Lef. 328, *per* Lord REDESDALE, C., at p. 336: "where the possession, order or disposition is in a person who is not the owner, to whom they do not properly belong, but whom the owner permits, unconscientiously as the Act supposes, to have such order and disposition." See *Re Watson & Co., Ex parte Atkin*, [1904] 2 K. B. 753.

(*q*) *Load* v. *Green* (1846), 15 M. & W. 216, *per cur.* at p. 223.

(*r*) *Joy* v. *Campbell, supra; Re Bankhead* (1856), 2 K. & J. 560; *Ex parte*

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Possession of *cestui que trust*.

If trustees leave goods in possession of the *cestui que trust* and they are entitled to take the possession from him, the goods are in the possession of the *cestui que trust* by consent of the true owner within the reputed ownership clause (*s*). A trustee who accepts the trust is the "true owner," but trustees who know nothing about the trust and have never accepted it are not "the true owners"; in such a case the true owners of the property are the *cestuis que trust* (*a*).

But if the *cestuis que trust* are in possession of goods in accordance with the trust, then they are not in possession with the consent of the trustees, but their possession is connected with the title, and the reputed ownership clause does not apply (*b*).

Possession of bankrupt.

284. A trustee in bankruptcy is the "true owner" of the bankrupt's goods within the meaning of the reputed ownership clause, and if he permits goods to remain in the bankrupt's possession, they may be seized by, and will then pass to, the trustee under a second bankruptcy (*c*).

Geaves, Re Strahan (1856), 8 De G. M. & G. 291; *Great Eastern Rail. Co.* v. *Turner* (1872), 8 Ch. App. 149; *Ex parte Sibeth, Re Sibeth* (1885), 14 Q. B. D. 417. The decision of CAVE, J., in *Re Webber, Ex parte Slater* (1891), 64 L. T. 426, to the contrary effect was reversed by the Court of Appeal, Times, July 14, 1891, p. 3. *Aliter*, when there is no *bonâ fide* reason for the creation of any trust, and the forms of a trust are gone through in order to conceal the true ownership of the property; in such a case there is an abuse of the forms of a trust for the purpose of creating a reputation of ownership, and the goods will pass to the trustee in bankruptcy (*Great Eastern Rail. Co.* v. *Turner, supra, per* Lord SELBORNE, L.C., at p. 153; see *Ex parte Watkins, Re Kidder* (1835), 2 Mont. & A. 348; *Ex parte Ord, Re Ord* (1835), 2 Mont. & A. 724). Where persons wrongfully take possession of property, although they may be made accountable as if they were trustees, *e.g.*, persons who make themselves executors *de son tort*, the principle as to trust property has no application, and if such persons are in possession of property with the consent of all who are entitled to dispute it with them, such persons are in possession with the consent of the true owners (*Fox* v. *Fisher* (1819), 3 B. & Ald. 135; *Re Thomas* (1842), 1 Ph. 159; see *Kitchen* v. *Ibbetson* (1873), L. R. 17 Eq. 46, *per* MALINS, V.-C., at p. 49, where *Fox* v. *Fisher, supra*, was applied to the case of an administratrix whom creditors allowed to remain in possession of the intestate's property). In *Re Fells, Ex parte Andrews* (1876), 4 Ch. D. 509, it was held that where the widow and executrix of a deceased person being also residuary legatee continued to carry on the business of the deceased as if it were her own, the assets of the business were not impressed with any trust in favour of the creditors, and, no objection being taken by the creditors, such assets remained in her order and disposition, and on her second marriage (before the Married Women's Property Act, 1882 (45 & 46 Vict. c. 75)) passed to her husband, and on his becoming bankrupt to her husband's creditors (see *Ex parte Moore* (1842), 2 Mont. D. & De G. 616; *Ex parte Horwood, Re Horwood* (1828), Mont. & M. 169; *Ex parte Martin, Re Martin* (1815), 2 Rose, 331).

(*s*) *Darby* v. *Smith* (1798), 8 Term Rep. 82; *Caffrey* v. *Darby* (1801), 6 Ves. 488, 496; *Ex parte Dale, Re Barker* (1819), Buck, 365. If the bankrupt agrees to purchase real property and personal chattels on the property, and without paying the purchase-money is let into possession, he is in possession as a reputed owner, and the personal chattels pass to the trustee in bankruptcy free of the lien for the unpaid purchase-money (*Ex parte Dale, Re Barker, supra*).

(*a*) *Re Mills*, [1895] 2 Ch. 564, see *per* LINDLEY, L.J., at p. 569.

(*b*) *Ex parte Martin, Re Martin* (1815), 2 Rose, 331; *Earl of Shaftesbury* v. *Russell* (1823), 1 B. & C. 666; but see *Ex parte Castle, Re Acraman* (1842), 3 Mont. D. & De G. 117.

(*c*) *Butler* v. *Hobson* (1838), 4 Bing. (N. C.) 290. But if the trustee in bankruptcy has no knowledge that the bankrupt has goods which really belong to

Safe custody.

285. If property is left for safe custody only, and the person with whom it is left has no means of making use of it, the property is not in the possession, order or disposition of the person with whom it is left with the consent of the true owner (*d*).

Possession of mortgagor.

286. If goods have been mortgaged, the mortgagee is the true owner, and if the mortgagee allows the mortgagor to continue in possession of the goods until his bankruptcy, the goods pass to the trustee (*e*). If there are several mortgages, the first mortgagee is the true owner (*f*).

Building contracts.

287. If in an agreement between a building owner and a builder there is a provision which gives to the building owner an immediate and unconditional right to all the materials brought on the site by the builder, then on the builder becoming bankrupt, while the building is unfinished, the materials are in the possession of the builder with the consent of the true owner and pass to the trustee (*g*). But, except where the effect of such a provision is to vest the ownership of the materials in the building owner immediately and unconditionally, the materials do not pass to the trustee in bankruptcy of the builder under the reputed ownership clause, and do not do so as forming part of the builder's property where the agreement contains a provision forfeiting them to the building owner which has become effective (*h*).

Nature of consent of true owner.

288. The consent of the owner must be to the appearance of the ownership of the bankrupt; the reputed ownership clause is aimed at permitting the bankrupt to obtain credit by means of the possession and apparent ownership of property which does not belong to him (*i*).

the trustee, the goods are not in the bankrupt's possession with the consent of the true owner (*Re Rawbone* (1857), 3 K. & J. 476; *Ex parte Ford, Re Caughey* (1876), 1 Ch. D. 521, 528). *Laches* on the part of the trustee would, it seems, amount to consent (*Re Rawbone, supra, per* PAGE WOOD, V.-C., at p. 485).

(*d*) *Webb* v. *Whinney* (1868), 18 L. T. 523, where a chest of plate was left for safe custody, but the owner kept the key. In *Re M'Parland, Ex parte Murphy* (1893), 31 L. R. Ir. 465, it was held that a piano left in the house of a person who was a mere gratuitous bailee did not come within the reputed ownership provisions.

(*e*) *Ryall* v. *Rowles* (1749-50), 1 Ves. Sen. 348; *Shuttleworth* v. *Hernaman* (1857), 1 De G. & J. 322; *Freshney* v. *Wells* (1857), 26 L. J. (C. P.) 129; *Re Ginger, Ex parte London and Universal Bank*, [1897] 2 Q. B. 461; *Re Hayes*, [1899] 2 Ir. 206; *Re Elliott, Ex parte the Trustee* (1901), 84 L. T. 325. But if the mortgagor leases the goods in question to another person, the goods are not in the possession etc. of such third person with the consent of the mortgagee, whose consent is only to the mortgagor's possession (*Fraser* v. *Swansea Canal Co.* (1834), 1 Ad. & El. 354).

(*f*) *Freshney* v. *Wells, supra.*

(*g*) *Re Weibking, Ex parte Ward*, [1902] 1 K. B. 713.

(*h*) *Re Keen & Keen, Ex parte Collins*, [1902] 1 K. B. 555. See further, title BUILDING CONTRACTS ETC.

(*i*) *Load* v. *Green* (1846), 15 M. & W. 216, at p. 223, in which case the bankrupt bought goods with the fraudulent intention of never paying for them. It was held that there was no consent on the part of the vendors to the goods being in the possession of the bankrupt, as the vendors had contemplated a sale and had no knowledge that they had any right to refuse possession of the goods.

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Consent presupposes knowledge (*k*) and capacity to consent (*l*).

Possession retaken by true owner.

289. If the true owner obtains possession of the goods before an act of bankruptcy is committed, the goods are not in the possession of the bankrupt with the owner's consent and do not pass to the trustee (*m*). If possession is really taken by the true owner with the intention of asserting his rights, it is immaterial whether the possession be hostile or friendly (*n*); if the owner puts a man in possession and the bankrupt continues to have the use of the goods subject to the control of the man who is put in possession, the owner's consent is effectively withdrawn, provided that the possession is a real one and not a sham (*o*). Taking possession of part of the goods by the owner may be sufficient revocation of his consent so as to amount to taking possession of the whole (*p*).

Demand of possession.

If possession is *bonâ fide* demanded by the owner before the act of bankruptcy, the goods are not in the bankrupt's possession with the consent of the owner, although he is unable to obtain actual possession (*q*).

Revocation of consent by notice.

If goods are at sea or in places where the owner cannot take possession, the owner can revoke his consent by giving notice, and, if there is no *laches* on his part, and notice is sent before but does not arrive till after the act of bankruptcy, it will be sufficient (*r*).

(*k*) *Re Rawbone* (1857), 3 K. & J. 476; *Ex parte Ford, Re Caughey* (1876), 1 Ch. D. 521, 528; *Re Mills*, [1895] 2 Ch. 564. If A., a person having a contract for the delivery of goods, asks B. to assist him by delivering part and B. stipulates that the goods should be delivered in B.'s name and A. delivers them in his own name, the goods are not in the possession etc. of A. with the consent of B. (*Ex parte Carlon* (1834), 4 Deac. & Ch. 120).

(*l*) *Re Mills, supra*, where it was held that infants and a married woman to whom the income of the property was payable for her separate use with a restraint on anticipation could not consent.

(*m*) *Storer* v. *Hunter* (1824), 3 B. & C. 368.

(*n*) *Ex parte National Guardian Assurance Co., Re Francis* (1878), 10 Ch. D. 408, *per* JAMES, L.J., at p. 413.

(*o*) *Ex parte National Guardian Assurance Co., Re Francis, supra*, at p. 414; *Vicarino* v. *Hollingsworth* (1869), 20 L. T. 362. In *Manton* v. *Moore* (1796), 7 Term Rep. 67, the engineer of a canal company contracted with the company to do certain work for them and purchased materials, which he brought on the company's premises; the company afterwards advanced money to him, and took a bill of sale of these materials, which were "symbolically" delivered to the company. It was held that when the property passed by the bill of sale, the possession of the goods, which were always on the company's premises, passed too; "the law referred the possession to the company who had the property and in whom the sole possession apparently was before" (*per* LAWRENCE, J., at p. 73). This was a case where the bankrupt could not derive any false credit from the supposed possession of the goods, because they appeared from the situation in which they were placed to belong to the true owner.

(*p*) *Re S. J. Eslick, Ex parte Phillips, Ex parte Alexander* (1876), 4 Ch. D. 496.

(*q*) *Smith* v. *Topping* (1833), 5 B. & Ad. 674; *Ex parte Ward, Re Couston* (1872), 8 Ch. App. 144; *Ex parte Harris, Re Pulling* (1872), 8 Ch. App. 48; *Ex parte North Western Bank, Re Slee* (1872), L. R. 15 Eq. 69; *Ex parte Montagu, Re O'Brien* (1876), 1 Ch. D. 554. See *Rutter* v. *Everett*, [1895] 2 Ch. 872. If the goods are in the warehouse of a third person to the order of the bankrupt, demand of possession from the bankrupt is sufficient and notice to the warehouseman is not necessary (*Ex parte Ward, Re Couston, supra*).

(*r*) *Ex parte Kelsall* (1846), De G. 352; *Acraman* v. *Bates* (1860), 2 E. & E. 456.

The withdrawal of the consent of the owner will be effective if it takes place before the act of bankruptcy is committed, even though it is on the same day on which such act is committed (*s*).

Debts.

290. Debts are taken out of the bankrupt's order and disposition if the debtor has notice from their real owner (*t*) or otherwise (*a*) of their having been assigned to him (*a*).

If notice of assignment of a debt is posted before the act of bankruptcy, it will be sufficient, though it does not arrive till afterwards (*b*).

Notice unnecessary in case of negotiable instruments.

If a debt is assigned by means of a negotiable instrument being given, notice of assignment is not necessary owing to the negotiability of the instrument (*c*); by accepting a bill a debtor has sufficient notice of the assignment of the debt so as to take the case out of the reputed ownership clause; but an unaccepted draft without notice to the debtor is not sufficient, and if the draft is not accepted before the act of bankruptcy, the debt remains in the order and disposition of the bankrupt (*d*).

To whom notice to be given.

The notice should be given to the person from whom the bankrupt was to have received payment of the money, or the person holding the property at the order and disposition of the bankrupt (*e*). It is not necessary that the debtor should have formal notice, if he knows of the assignment, and the knowledge of an agent or solicitor of the debtor will in some cases be the knowledge of the debtor (*f*).

Bankrupt must be reputed owner.

291. The goods or debts must be in the possession, order or disposition of the bankrupt in such circumstances that he is the reputed owner thereof.

Reputation a question of fact.

It is a question of fact whether the circumstances of a bankrupt's possession etc. are such as to create a reputation of ownership; there is a reputation of ownership if the goods are in such

(*s*) *Ex parte Harris, Re Pulling* (1872), 8 Ch. App. 48; *Re S. J. Eslick, Ex parte Phillips, Ex parte Alexander* (1876), 4 Ch. D. 496. In some cases taking possession after the act of bankruptcy will be sufficient; if a person by a dealing which is a protected transaction under s. 49 of the Bankruptcy Act, 1883 (46 & 47 Vict. c. 52), takes possession of goods, he must be treated as getting possession before an act of bankruptcy is committed (*Re Seaman, Ex parte Furness Finance Co.*, [1896] 1 Q. B. 412, *per* VAUGHAN WILLIAMS, J., at p. 416).

(*t*) *Gardner* v. *Lachlan* (1838), 4 My. & Cr. 129; *Cooke* v. *Hemming* (1868), L. R. 3 C. P. 334, at p. 342; *Re Tillett, Ex parte Kingscote* (1889), 6 Morr. 70; *Rutter* v. *Everett*, [1895] 2 Ch. 872.

(*a*) *Colonial Bank* v. *Whinney* (1886), 11 App. Cas. 426, at p. 435.

(*b*) *Belcher* v. *Bellamy* (1848), 2 Exch. 303; *Re John Dixon, Ex parte the Trustee* (1900), 83 L. T. 433.

(*c*) *Re Goetz, Jonas & Co., Ex parte the Trustee*, [1898] 1 Q. B. 787, at p. 794.

(*d*) *Ibid.* As to what is sufficient notice of assignment, see *Re John Dixon, Ex parte the Trustee* (1900), 83 L. T. 433.

(*e*) *Gardner* v. *Lachlan, supra.* The appointment of a receiver, unless followed by notice to the debtor within a reasonable time, is not sufficient (*Re Tillett, Ex parte Kingscote, supra; Rutter* v. *Everett, supra*).

(*f*) *Tibbits* v. *George* (1836), 5 Ad. & El. 107; but see *Saffron Walden Second Benefit Building Society* v. *Rayner* (1880), 14 Ch. D. 406. As to what is notice to a company, see *Société Générale de Paris* v. *Tramways Union Co.* (1884), 14 Q. B. D. 424.

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a situation as to convey to the minds of those who know their situation the reputation of ownership, that reputation arising by the legitimate exercise of reason and judgment on the knowledge of those facts which are capable of being generally known to those who choose to make inquiry on the subject; it is not necessary, in order to exclude the doctrine of reputed ownership, to show that every creditor, or any particular creditor, or the outside world who are not creditors, knew anything whatever about the particular goods one way or the other; it is sufficient if the situation of the goods was such as to exclude all legitimate ground from which those who knew anything about that situation could infer the ownership to be in the person having actual possession (*g*).

Goods sold, but remaining in bankrupt's possession.

Where the goods originally belonged to the bankrupt and were afterwards sold by him and he remains in possession, this may raise a strong presumption of the reputation of ownership (*h*), but there is no inflexible rule of law that, because a man who was once the owner of goods and has sold them remains in possession, he must, therefore, be held to be the reputed owner (*i*). Where there has been a public sale of the goods, then the change of property becomes notorious and the presumption of reputation of ownership is rebutted (*k*).

When reputation of ownership rebutted.

292. The reputation of ownership is rebutted by the notoriety that goods of the particular description are by the usage of trade in the possession of persons who are not the owners (*l*).

(*g*) *Ex parte Watkins, Re Couston* (1873), 8 Ch. App. 520, *per* Lord SELBORNE, L.C., at p. 528, quoted by Lord BLACKBURN in *Colonial Bank* v. *Whinney* (1886), 11 App. Cas. 426, at p. 436.

(*h*) See *Lingham* v. *Biggs* (1797), 1 Bos. & P. 82; *Lingard* v. *Messiter* (1823), 1 B. & C. 308; *Ex parte Castle, Re Acraman* (1842), 3 Mont. D. & De G. 117; *Ex parte Lovering, Re Jones* (1874), 9 Ch. App. 621; *Ex parte Brooks, Re Fowler* (1883), 23 Ch. D. 261.

(*i*) *Ex parte Watkins, Re Couston, supra*, at p. 528; *Colonial Bank* v. *Whinney, supra*, at p. 436.

(*k*) *Lingard* v. *Messiter, supra, per* BAYLEY, J., at p. 313; *Kidd* v. *Rawlinson* (1800), 2 Bos. & P. 59. But an advertisement of a sale followed by an ineffective attempt at a sale does not destroy the apparent ownership (*Reynolds* v. *Hall* (1859), 4 H. & N. 519). As to cases where goods which have been purchased and marked as the purchaser's remain in the vendor's possession, see *Ex parte Marrable, Re Brown* (1824), 1 Gl. & J. 402; *Ex parte Dover* (1841), 2 Mont. D. & De G. 259; *Knowles* v. *Horsfall* (1821), 5 B. & Ald. 134. In *Shrubsole* v. *Sussams* (1864), 16 C. B. (N. S.) 452, where the mortgagee of an inn took possession of the inn and had the mortgagor's name painted out, but left the mortgagor there as manager, it was held that the apparent ownership was put an end to.

(*l*) *E.g.*, the custom of hotel-keepers and boarding-house keepers to hire furniture (*Mullett* v. *Green* (1838), 8 C. & P. 382; *Ex parte Powell, Re Matthews* (1875), 1 Ch. D. 501; *Crawcour* v. *Salter* (1881), 18 Ch. D. 30; *Ex parte Turquand, Re Parker* (1885), 14 Q. B. D. 636; *Re Chapman* (1894), 1 Mans. 415); of a coal merchant to use hired barges (*Watson* v. *Peache* (1834), 1 Bing. (N. C.) 327); of coachbuilders to have the carriages of private individuals on their premises for sale (*Carruthers* v. *Payne* (1828), 5 Bing. 270); of clockmakers to have clocks sent for repair standing in their shops (*Hamilton* v. *Bell* (1854), 10 Exch. 545); of a tradesman to use hired horses and carts (*Ex parte Wiggins* (1832), 2 Deac. & Ch. 269); of printers to hire printing machinery (*Re Thackrah, Ex parte Hughes & Kimber* (1888), 5 Morr. 235); of booksellers to receive books as factors on sale for commission (*Whitfield* v. *Brand* (1847), 16 M. & W. 282); of

SUB-SECT. 5. Reputed Ownership.

Where goods pass in the ordinary course of trade by delivery and indorsement of documents of title, *e.g.*, bills of lading, dock warrants, orders for delivery etc., the possession of such documents by the true owner, if coupled with notice to the person having the custody of the goods, will generally be sufficient to exclude the reputed ownership of the bankrupt (*m*).

Sale or return.

Goods which are sent by a wholesale dealer to a retail customer "on sale or return" will not belong to the trustee in bankruptcy of the customer, unless they have remained so long in his possession as to furnish an inference of his election to take them (*n*); a notorious custom for goods to be sent in this way will exclude the reputation of ownership (*o*).

Separate property of wife.

293. Goods which are the separate property of a married woman, and employed by her in a business carried on separately from her husband, are not in the reputed ownership of the husband, if he does not interfere in the business (*p*). But a gift to a wife by her husband of property which continues in his order and disposition or reputed ownership is not by virtue of the Married Women's Property Act, 1882, valid as against the creditor of the husband when bankrupt (*q*).

Right of real owner.

294. If the real owner loses the goods by virtue of the reputed ownership clause, he will have a right to prove in bankruptcy for the amount of his loss (*r*).

SUB-SECT. 6.—*Relation back of Title of the Trustee.*

When bankruptcy is deemed to commence.

295. Subject to the exceptions already discussed, all property which belongs to or is vested in the bankrupt at the commencement of the bankruptcy, or which may be acquired by or devolve on him before his discharge, passes to the trustee (*s*). The bankruptcy is deemed to have relation back and to commence at the time when the act of bankruptcy is committed on which the receiving order is made (*t*); if the bankrupt has committed more acts of bankruptcy than one, the bankruptcy commences

farmers agisting cattle (*Re Woodward, Ex parte Huggins* (1886), 3 Morr. 75, and see title AGRICULTURE, Vol. I., p. 276); of manufacturers and wholesale dealers to send iron safes to retail ironmongers upon sale or return, or to sell as agents (*Re Lock, Ex parte Poppleton* (No. 2) (1891), 8 Morr. 51).

(*m*) *Lucas* v. *Dorrien* (1817), 7 Taunt. 278; *Jones* v. *Dwyer* (1812), 15 East, 21; *Spear* v. *Travers* (1815), 4 Camp. 251; *Tucker* v. *Ruston* (1825), 2 C. & P. 86; *Greening* v. *Clark* (1825), 4 B. & C. 316; *Lempriere* v. *Pasley* (1788), 2 Term Rep. 485.

(*n*) *Neate* v. *Ball* (1801), 2 East, 117; *Ex parte Wingfield, Re Florence* (1879), 10 Ch. D. 591. See Sale of Goods Act, 1893 (56 & 57 Vict. c. 71), s. 18 (4). See title SALE OF GOODS.

(*o*) *Ex parte Wingfield, Re Florence, supra; Re Lock, Ex parte Poppleton* (No. 2) (1891), 8 Morr. 51.

(*p*) *Jarman* v. *Woolloton* (1790), 3 Term Rep. 618; *Haselinton* v. *Gill* (1784), 3 Term Rep. 620, n. See *Ex parte Cox, Re Reed* (1875), 1 Ch. D. 302.

(*q*) Married Women's Property Act, 1882 (45 & 46 Vict. c. 75), s. 10.

(*r*) *Re Button, Ex parte Haviside*, [1907] 2 K. B. 180; *Joy* v. *Campbell* (1804), 1 Sch. & Lef. 328, at p. 338.

(*s*) Bankruptcy Act, 1883 (46 & 47 Vict. c. 52), s. 44 (i.). See pp. 144 *et seq.*, *ante*.

(*t*) *I.e.*, at the exact time of day when the act of bankruptcy was committed, not at the beginning of that day (*Re Bumpus, Ex parte White*, [1908] W. N. 90). As to what constitutes an act of bankruptcy, see pp. 13 *et seq.*, *ante*.

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at the time of the first of the acts of bankruptcy proved to have been committed by the bankrupt within three months next preceding the date of the presentation of the bankruptcy petition (*u*).

Receiving order on debtor's petition.

If the receiving order is made on the debtor's own petition and within three months before the date of the presentation of the petition he has committed no other act of bankruptcy than the presentation of the petition, then the bankruptcy commences with the presentation of the petition (*a*); if within the three months he has committed only one act of bankruptcy besides the presentation of his petition, then the bankruptcy commences at the time of such act; if within the three months he has committed more than one act of bankruptcy besides the presentation of his own petition, the bankruptcy commences at the time when the first of such acts within the three months was committed.

Receiving order on creditor's petition.

If the receiving order has been made on a creditor's petition and the bankrupt has committed only one act of bankruptcy before the presentation of the petition, the bankruptcy commences when that act was committed; if he has committed more than one act of bankruptcy within the three months, the bankruptcy commences when the first of such acts within the three months was committed.

Act of bankruptcy debtor's own act.

If the act of bankruptcy is the act of the bankrupt himself (*e.g.*, a fraudulent transfer of property), the title of the trustee relates back to the moment of the commencement of the act done by the bankrupt, but if it is not a voluntary act, but a proceeding *in invitum* (*e.g.*, the sale of goods under an execution), the title relates back only to the moment after the completion of the transaction which constitutes the act of bankruptcy (*b*).

Protected transactions.

Certain transactions between the commencement of the bankruptcy and the date of the receiving order, if entered into without notice of any available act of bankruptcy, are protected (*c*), but, except in cases which fall within that protection, all dealings by the bankrupt with his property between the commencement of the bankruptcy and the adjudication are impeachable by the trustee. But with the exception of certain settlements which are impeachable under s. 47 of the Bankruptcy Act, 1883 (*d*), and of settlements and dispositions of property which can be set aside as fraudulent or invalid (*e*), no disposition of property can be impeached under the bankruptcy law, if it took place more than three months before the presentation of the petition on which the receiving order is made (*f*), or if it took place before the first act of bankruptcy committed within the three months (*g*).

(*u*) Bankruptcy Act, 1883 (46 & 47 Vict. c. 52), s. 43.

(*a*) *Ibid.*, s. 8.

(*b*) *Ex parte Villars, Re Rogers* (1874), 9 Ch. App. 432, *per* JAMES, L.J., at p. 445; *Re North, Ex parte Hasluck*, [1895] 2 Q. B. 264; *Re Beeston*, [1899] 1 Q. B. 626; but see *Ex parte Helder, Re Lewis* (1883), 24 Ch. D. 339.

(*c*) Bankruptcy Act, 1883 (46 & 47 Vict. c. 52), s. 49.

(*d*) 46 & 47 Vict. c. 52. See p. 275, *post.*

(*e*) See pp. 275, 279, *post.*

(*f*) *Ex parte Games, Re Bamford* (1879), 12 Ch. D. 314; *Allen* v. *Bonnett* (1870), 5 Ch. App. 577; *Re Beeston*, [1899] 1 Q. B. 626; *Re Harvey, Ex parte Harvey & Co.* (1890), 7 Morr. 138.

(*g*) Bankruptcy Act, 1883 (46 & 47 Vict. c. 52), s. 43.

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296. After the commencement of the bankruptcy the bankrupt has no valid power of disposal of his property; a debtor who has committed an act of bankruptcy cannot after such act give a good title to any property belonging to him (*h*), and, subject to the exceptions in s. 49 of the Bankruptcy Act, 1883 (*i*), any disposition of property then made by the bankrupt or anyone on his behalf may afterwards be impeached by the trustee, and any property so disposed of may afterwards be recovered by the trustee, or the person who made the disposition may be made liable to the trustee for the value of the property (*j*). A man who has committed an act of bankruptcy is not entitled to deal with his property; he has no right to gather it in, if it is not already in his hands, or to make payments to his creditors out of that which he has actually at his command; he can give no good discharge to a debtor who pays him with notice of the act of bankruptcy, because the debt may by subsequent bankruptcy proceedings be turned into a debt due to his trustee, and not to himself (*k*).

Effect of bankruptcy on bankrupt's right of disposal.

While the bankrupt until commission of the act of bankruptcy was beneficial owner of whatever assets he possessed, by the act of bankruptcy his title to be regarded as such beneficial owner is no longer absolute, but is contingent on no bankruptcy petition being presented within three months of the date of the act of bankruptcy. If a receiving order is made, the whole of the assets vest in his trustee as from the date of the act of bankruptcy. Should the contingency of bankruptcy occur, the person who has committed an act of bankruptcy is from the date of the act of bankruptcy something less than a mere trustee of his assets for the creditors in his bankruptcy. Until this state of suspense has been removed, either by a receiving order or by lapse of time, he has no right to deal with those assets that were in his hands, and can give no title in them to any transferee with notice. Similarly, with regard to the debts and other

Position of debtor after act of bankruptcy.

(*h*) *Ponsford, Baker & Co.* v. *Union of London and Smith's Bank, Ltd.*, [1906] 2 Ch. 444, 452; *Western* v. *Harris* (1889), 24 L. J. N. C. 113. The effect of s. 49 of the Bankruptcy Act, 1883 (46 & 47 Vict. c. 52), is only to make valid, in the interests of persons *bonâ fide* dealing with the bankrupt, a disposition which would otherwise be invalid. It does not confer any power of disposition on the bankrupt. A person who has contracted with the bankrupt to purchase real property, and, it seems, any other property, *bonâ fide* and for value and without notice of the act of bankruptcy might, on discovering the act of bankruptcy, repudiate the transaction on the ground that the person has no title. See *Western* v. *Harris*, *supra*; *Powell* v. *Marshall, Parkes & Co.*, [1899] 1 Q. B. 710. A sale on credit to the bankrupt after he has committed an act of bankruptcy is valid, unless it is established that the bankrupt bought the goods, not intending to pay for them (*Ex parte Whittaker, Re Shackleton* (1875), 10 Ch. App. 446).

(*i*) 45 & 46 Vict. c. 52. See p. 288, *post*.

(*j*) *Vernon* v. *Hankey* (1787), 2 Term Rep. 113. See *Vernon* v. *Hanson* (1788), 2 Term Rep. 287. If a letter which constitutes a valid equitable assignment of the bankrupt's property is posted before bankruptcy, the rights of the parties are fixed as soon as the letter is posted, and bankruptcy supervening after the posting but before the receipt of the letter does not affect the rights of the assignee (*Alexander* v. *Steinhardt, Walker & Co.*, [1903] 2 K. B. 208).

(*k*) *Ponsford, Baker & Co.* v. *Union of London and Smith's Bank, Ltd.*, [1906] 2 Ch. 444, *per* FLETCHER MOULTON, L.J., at p. 452; and see *Davis* v. *Petrie*, [1905] 2 K. B. 528, where a person from whom a trustee under a deed of assignment collected debts due to the debtor had to pay over again to the trustee in bankruptcy.

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choses in action which form part of his estate, he cannot collect them or give a valid discharge for them (*l*). Even a secured creditor is not entitled to receive payment of his debt from his debtor and to hand over his securities after notice of an act of bankruptcy on the part of the debtor (*m*). And although an allegation in an action for a debt due that the defendant had notice of an act of bankruptcy on the part of the creditor is no answer to an action by a creditor against his debtor (*n*), and the payment by the debtor under a judgment in such an action will be a discharge of his debt, it seems that the court has power to keep the sum recovered *in medio* until it be seen whether bankruptcy proceedings follow (*o*).

Payments by bankrupt.

297. If money of the bankrupt has been paid away by him or by an agent on his behalf after the commencement of the bankruptcy without the compulsion of legal process, then, if the transaction is not within s. 49 of the Bankruptcy Act, 1883 (*p*), the money may be recovered from the person who has received it (*q*) or from the agent

(*l*) *Ponsford, Baker & Co.* v. *Union of London and Smith's Bank, Ltd.*, [1906] 2 Ch. 444, at p. 452, overruling *Re Lawford & Laurence, Ex parte the Trustee*, [1902] 2 K. B. 445.

(*m*) *Ibid.*

(*n*) *Foster* v. *Allanson* (1788), 2 Term Rep. 479.

(*o*) *Ponsford, Baker & Co.* v. *Union of London and Smith's Bank, Ltd., supra*, at p. 454. Where the bankrupt is a beneficed clergyman, a sequestration issued before the date of the receiving order by a person who had no notice of an available act of bankruptcy would have priority over a sequestration issued by the trustee (Bankruptcy Act, 1883 (46 & 47 Vict. c. 52), s. 52 (1)).

(*p*) 46 & 47 Vict. c. 52. See p. 288, *post*.

(*q*) Thus, where a solicitor to the petitioning creditor received from the debtor various sums of money for successive adjournments of the hearing of the petition and paid over these sums to his client, and the debtor was afterwards adjudicated bankrupt, it was held that, the solicitor having received the money with notice of the act of bankruptcy to which the trustee's title related back, the payment by him to his client was a wrongful act, and that he was liable to repay the money to the trustee (*Ex parte Edwards, Re Chapman* (1884), 13 Q. B. D. 747). So payments to an accountant with notice of an act of bankruptcy are recoverable from the accountant (*Re White, Ex parte Ward* (1898), 5 Mans. 17; but see *Re Simonson, Ex parte Ball*, [1894] 1 Q. B. 433). But money *bonâ fide* paid by a debtor to his solicitor for costs and counsel's fees in opposing proceedings in bankruptcy cannot be recovered from the solicitor, even though he had notice of the act of bankruptcy (*Re Sinclair, Ex parte Payne* (1885), 15 Q. B. D. 616). But if the solicitor of the bankrupt has money of the bankrupt in his hands, he is not entitled to retain out of such money any amount for costs incurred after he has notice of the commission of the act of bankruptcy (*Re Spackman, Ex parte Foley* (1890), 24 Q. B. D. 728; *Re Pollitt, Ex parte Minor*, [1893] 1 Q. B. 175; *Re Whitlock, Ex parte Official Receiver* (1893), 1 Mans. 33; *Re Mander, Ex parte Official Receiver* (1902), 86 L. T. 234). A solicitor who before an act of bankruptcy has received from the debtor a lump sum to cover future costs, cannot on bankruptcy supervening retain any part of this sum except so much of it as represents costs incurred before the act of bankruptcy; the authority of solicitors is determined by an act of bankruptcy (*Re Beyts & Craig, Ex parte Cooper & Irvine* (1894), 1 Mans. 56); but if a valid agreement in writing is made between solicitor and client for the payment of a certain lump sum in consideration of the solicitor undertaking certain work for the client (*e.g.*, defending him on a criminal charge), and the sum is paid before the act of bankruptcy, the trustee in bankruptcy cannot afterwards recover any part of this sum, unless the agreement is upset under s. 10 or s. 14 of the Solicitors Act, 1870 (33 & 34 Vict. c. 28) (*Re Charlwood, Ex parte Masters*, [1894] 1 Q. B. 643).

who paid it on behalf of the bankrupt (*r*). If the money of the bankrupt has after the commencement of the bankruptcy been paid away under an illegal agreement (*e.g.*, to stifle a criminal prosecution), the trustee is in a better position than the bankrupt and may recover the money from the person to whom it was paid, although the bankrupt himself, being *in pari delicto*, could not have recovered it (*s*).

Payment to bankrupt.

298. Similarly, if money due to the bankrupt is, after an act of bankruptcy in a case which is not within the protection of s. 49 of the Bankruptcy Act, 1883 (*t*), paid to the bankrupt or his agent, such a payment is invalid, and the debtor of the bankrupt can be obliged to pay over the sum again to the trustee (*u*), or the sum might be recovered from the agent (*w*).

Payment under garnishee order.

If a person who owes a debt to a bankrupt pays his debt to a judgment creditor of the bankrupt upon being served with a garnishee order *nisi* after the act of bankruptcy and without waiting till the order is made absolute, he does not discharge his liability (*x*).

The trustee may adopt and pay for services rendered to a bankrupt after notice of the act of bankruptcy, where such services clearly result in a benefit or profit to the bankrupt's estate commensurate with the services rendered, but he must be very strict in the application of this liberty (*Re Simonson, Ex parte Ball*, [1894] 1 Q. B. 433; see *Re F. H. Johnstone, Ex parte Angier* (1884), 1 Morr. 213; *Re Foster, Ex parte Official Receiver* (1895), 72 L. T. 364).

(*r*) *Re Simonson, Ex parte Ball*, [1894] 1 Q. B. 433; *Re Forster, Ex parte Rawlings* (1887), 4 Morr. 292. But a person who receives the money of the bankrupt and acts as a mere messenger or carrier between the bankrupt and another party and pays over the money, is not liable to be sued for the money (*Coles* v. *F. Wright* (1811), 4 Taunt. 198). If a payment by an agent is an act of bankruptcy on the part of the principal, as the act of bankruptcy is not complete till the payment is made, the trustee in bankruptcy has no claim against the agent in respect of such payment (*Ex parte Helder, Re Lewis* (1883), 24 Ch. D. 339). If the trustee recovers the money from the person who has paid away the bankrupt's money, he cannot afterwards sue the person who has received it (*Vernon* v. *Hanson* (1788), 2 Term Rep. 287). When an account is opened at a bank in the name of the bankrupt's wife, and the money, although the bank has no notice of this, is really the property of the bankrupt, the bank is bound to honour the wife's cheques until the trustee obtains a declaration that the money is the bankrupt's, and the bank cannot be made to pay over to the trustee the sums paid by the bank before the date of the declaration (*Re Montague, Ex parte Ward* (1897), 4 Mans. 1).

(*s*) *Ex parte Wolverhampton Banking Co., Re Campbell* (1884), 14 Q. B. D. 32, distinguishing *Ex parte Caldecott, Re Mapleback* (1876), 4 Ch. D. 150. As to money advanced by a third person for a specific purpose, see p. 172, *ante*.

(*t*) 46 & 47 Vict. c. 52. See p. 288, *post*.

(*u*) *McEntire* v. *Potter & Co.* (1889), 22 Q. B. D. 438. Where the bankrupt, after presentation of a bankruptcy petition against him, contracted to sell real estate, and after adjudication the purchaser paid the bankrupt the purchase money, it was held that the purchaser could not insist on a conveyance of the property except on payment of the purchase money over again; he had paid the purchase money to a person who was not the owner of the property (*Ex parte Rabbidge, Re Pooley* (1878), 8 Ch. D. 367).

(*w*) But if there are mutual credits between the bankrupt and his agent, the agent is entitled to have the account taken at least up to the time when the agent had notice of the act of bankruptcy. An authority to receive money is not revoked by an act of bankruptcy when it is acted upon without notice of such act (*Elliott* v. *Turquand* (1881), 7 App. Cas. 79, see *Ex parte Snowball, Re Douglas* (1872), 7 Ch. App. 534).

(*x*) *Re Webster, Ex parte Official Receiver*, [1907] 1 K. B. 623; *Wood* v. *Dunn*

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If he pays after the garnishee order is made absolute, he is protected by the order of the Court (*y*); but if, after the garnishee order is made absolute, the debtor does not pay and there is an agreement for extension of time for payment, and meanwhile a receiving order is made against the judgment debtor, the judgment creditor loses his security, and a payment afterwards by the debtor to the judgment creditor would be invalid, and the debtor would have to pay over again to the trustee (*a*). A debt owing to the bankrupt if paid to the trustee of a deed of assignment of the bankrupt's property is not discharged, and the person who owes the debt can be compelled to pay it over again to the trustee in bankruptcy (*b*). If the bankrupt has validly assigned or charged future debts, on the commencement of the bankruptcy the charge ceases to operate in respect of any sums which were not due before the act of bankruptcy (*c*), but the charge would be valid as regards sums due before, but payable after, such act (*d*).

Payment to bankrupt's assignee.

Payment by trustee of deed of arrangement which is set aside.

299. If a deed is set aside as an act of bankruptcy, *e.g.*, an assignment of property for the benefit of creditors, the trustee of the deed is not entitled to retain out of the assets in his hands any sum for the expenses incurred in the execution of the deed (*e*), and if the trustee of the deed has paid out of the assets any sum to a solicitor or other person in respect of work done in reference to the execution of the deed, the trustee of the deed may be compelled by the trustee in bankruptcy to repay such sum (*f*). The trustee in bankruptcy

(1866), L. R. 2 Q. B. 73. See *Turner* v. *Jones* (1857), 1 H. & N. 878; *Mayor etc. of London* v. *London Joint Stock Bank* (1881), 6 App. Cas. 393.

(*y*) *Re Smith, Ex parte Brown* (1888), 20 Q. B. D. 321. He is protected, in the absence of fraud, even though the judgment in respect of which the order is made is afterwards set aside; in such a case the remedy of the trustee would be against the judgment creditor (*ibid.*). See also *Wood* v. *Dunn* (1866), L. R. 2 Q. B. 73.

(*a*) Bankruptcy Act, 1883 (46 & 47 Vict. c. 52), s. 45; *Re Trehearne, Ex parte Ealing Local Board* (1890), 7 Morr. 261. As to the effect of bankruptcy on executions, see *Trustee of John Burns-Burns* v. *Brown*, [1895] 1 Q. B. 324, and p. 271, *post*.

(*b*) *Davis* v. *Petrie*, [1906] 2 K. B. 786.

(*c*) *Ex parte Nichols, Re Jones* (1883), 22 Ch. D. 782; *Wilmot* v. *Alton*, [1897] 1 Q. B. 17.

(*d*) *Ex parte Moss, Re Toward* (1884), 14 Q. B. D. 310; *Re Davis & Co., Ex parte Rawlings* (1888), 22 Q. B. D. 193.

(*e*) *Re J. & H. Richards, Ex parte Official Receiver* (1884), 1 Morr. 242; *Smith* v. *Dresser* (1866), L. R. 1 Eq. 651.

(*f*) *Re Forster, Ex parte Rawlings* (1887), 4 Morr. 292. As such a deed is an act of bankruptcy and may be treated as such by any dissentient creditor, it is the duty of every person to treat it as an act of bankruptcy, and not to act upon it in any way until the statutory period has elapsed, after which it cannot be impeached as being such an act of bankruptcy (*Re Martin* (1888), 21 Q. B. D. 29, *per* CAVE, J., at p. 33). But if the estate has benefited by the action of the trustee of the deed, he may be allowed reasonable remuneration (*Re Foster, Ex parte Official Receiver* (1895), 72 L. T. 364; see *Re Simonson, Ex parte Ball*, [1894] 1 Q. B. 433; *Re F. H. Johnstone, Ex parte Angier* (1884), 1 Morr. 213). If a settlement is set aside, not as an act of bankruptcy, but as invalid, the trustees of the settlement are entitled to retain out of the assets in their hands their costs of defending an action brought to set it aside (*Merry* v. *Pownall*, [1898] 1 Ch. 306; *Re Holden, Ex parte Official Receiver* (1887), 20 Q. B. D. 43). If a person to the knowledge of the official receiver incurs expense

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must elect either to treat the trustee of the deed as a trespasser or to accept his acts and treat him as agent. If the trustee of the deed is treated as a trespasser, he must deliver up all the property of the debtor which is in his hands, and must pay for the value of the property which he has converted, such value to be estimated as at the time when he took possession; if he is treated as an agent, he must hand over all the property of the debtor which is in his hands and account for the profits which he has made or ought to have made (*g*).

Sale of business to company.

If the sale of a business to a sham company which afterwards goes into liquidation is set aside as fraudulent and an act of bankruptcy, the title of the trustee relates back to the date of the transfer of the business and overrides the rights of the liquidator in the winding-up (*h*). But in the case of such a sale to a company, the directors on the sale being set aside are, in the absence of *mala fides* on their part, only liable to account for the bankrupt's property remaining in their hands, and cannot be called upon to account for the proceeds of the business that have passed through their hands (*i*). If a voluntary settlement is void under the Bankruptcy Act, 1883 (*j*), it is only void from the commencement of the bankruptcy, and therefore if before that time the property comprised in the settlement has been sold to a *bonâ fide* purchaser for value, the title of the purchaser will be good as against the trustee (*k*).

Disclaimer.

300. The relation back of the trustee's title does not, as regards property disclaimed by the trustee, affect the rights and liabilities of persons who are not parties to the bankruptcy (*l*).

Forfeiture of income.

301. Where a person is entitled to income till he shall do or suffer any act whereby it would if payable to himself become vested in some other person and commits an act of bankruptcy, then, inasmuch as, if there had been no forfeiture clause, the income would have vested in the trustee on the day when the act of bankruptcy

in preserving assets of the bankrupt, the official receiver cannot take the assets so preserved without reimbursing such person for his expense (*Re Tyler, Ex parte Official Receiver*, [1907] 1 K. B. 865), but otherwise in the case of a voluntary payment by a creditor of part of the bankrupt's debts (*Re Hall, Ex parte Official Receiver*, [1907] 1 K. B. 875). If the assignee of the whole of the debtor's property *bonâ fide* advances sums of money to the debtor for the purpose of carrying on the debtor's business, the assignee may be entitled to prove in respect of such sums in the bankruptcy of the assignor (*Ex parte Chaplin, Re Sinclair* (1884), 26 Ch. D. 319).

(*g*) *Ex parte Vaughan, Re Riddeough* (1884), 14 Q. B. D. 25. The trustee in bankruptcy may sue a debtor to the bankrupt for a debt which has been paid to the trustee of the deed unless the debtor can show that the trustee in bankruptcy has received the money or some part of it (*Davis* v. *Petrie*, [1906] 2 K. B. 786, at p. 788).

(*h*) *Re Carl Hirth, Ex parte the Trustee*, [1899] 1 Q. B. 612, not following *Re Carey, Ex parte Jeffreys*, [1895] 2 Q. B. 624.

(*i*) *Re Ely* (1900), 48 W. R. 693.

(*j*) 46 & 47 Vict. c. 52, s. 47; see p. 275, *post*.

(*k*) *Re Carter and Kenderdine*, [1897] 1 Ch. 776, following *Re Brall, Ex parte Norton*, [1893] 2 Q. B. 381.

(*l*) *Stein* v. *Pope*, [1902] 1 K. B. 595, where a lessee assigned a lease to the defendant by a deed which was an act of bankruptcy, and the trustee disclaimed the lease, and it was held that, notwithstanding the bankruptcy, the defendant was liable, as assignee, to pay the rent of the demised premises.

SUB-SECT. 6. Relation back of Trustee's Title.

was committed, the forfeiture takes place then and not at the date of adjudication (*m*).

SUB-SECT. 7.—*Realisation of Property.*

Duty to take possession of property.

302. It is the duty of the trustee as soon as possible to take possession of the deeds, books and documents of the bankrupt, and all other parts of his property (*n*) capable of manual delivery (*o*).

In relation to and for the purpose of acquiring and retaining possession of such property, he is in the same position as if he were a receiver of the property appointed by the High Court, and the court may, on his application, enforce such acquisition or retention (*p*).

Stocks, shares etc.

Where any part of the property of the bankrupt consists of stock, shares in ships, shares, or any other property transferable in the books of any company, office or person, the trustee may exercise the right to transfer the property to the same extent as the bankrupt might have exercised it if he had not become bankrupt (*q*).

Copyholds etc.

Where any part of the property of the bankrupt is of copyhold or customary tenure, or is any like property passing by surrender and admittance or in any similar manner, the trustee need not be admitted to the property, but may deal with it in the same manner as if it had been capable of being and had been duly surrendered or otherwise conveyed to such uses as the trustee may appoint; and any appointee of the trustee shall be admitted to or otherwise invested with the property accordingly (*r*).

Things in action.

Where any part of the property of the bankrupt consists of

(*m*) *Montefiore* v. *Guedalla*, [1901] 1 Ch. 435.

(*n*) As to the meaning of property, see p. 14, *ante*.

(*o*) Bankruptcy Act, 1883 (46 & 47 Vict. c. 52), s. 50 (1). By the Bankruptcy Rules, r. 349, no person can, as against the official receiver or trustee, withhold possession of the books of account belonging to the debtor, or set up any lien thereon (*Capital and Counties Bank* v. *Trustee of John Stevens* (1901), 17 T. L. R. 260); this provision is limited to books of account (*Re Winslow, Ex parte Godfrey* (1886), 16 Q. B. D. 696). It does not apply to books of account which have been sold before bankruptcy (*Re West, Ex parte Good* (1882), 21 Ch. D. 868). An assignment of book debts will carry the right to the books (*Re White & Co., Ex parte Official Receiver* (1884), 1 Morr. 77). If other persons have a joint property in the books of account, the trustee is not entitled to possession of the books, but the other persons must give the trustee reasonable facilities for inspecting the books (*Re Burnand, Ex parte Baker, Sutton & Co.*, [1904] 2 K. B. 68). As regards papers of the bankrupt other than account books, the trustee is entitled to inspect them even if a lien is claimed on them by other persons (*Re Toleman and England, Ex parte Bramble* (1880), 13 Ch. D. 885). As to the trustee's rights where an order is made under an extradition treaty for the delivery up to a foreign state of property of the bankrupt for the purpose of criminal proceedings there, see *Re Borovsky & Weinbaum, Ex parte Salaman*, [1902] 2 K. B. 312.

(*p*) Bankruptcy Act, 1883 (46 & 47 Vict. c. 52), s. 50 (2). See title RECEIVERS AND MANAGERS.

(*q*) *Ibid.*, s. 50 (3). See *Re Bentham Mills Spinning Co.* (1879), 11 Ch. D. 900; *Ex parte Harrison, Re Cannock and Rugeley Colliery Co.* (1885), 28 Ch. D. 363; *Re W. Key & Son, Ltd.*, [1902] 1 Ch. 467; *Re London and Provincial Telegraph Co.* (1870), L. R. 9 Eq. 653.

(*r*) Bankruptcy Act, 1883 (46 & 47 Vict. c. 52), s. 50 (4). See title COPYHOLDS.

things in action, such things are deemed to have been duly assigned to the trustee (*s*).

SUB-SECT. 7. Realisation of Property.

Duty of agents of bankrupt.

303. Any treasurer, or other officer, or any banker, attorney, or agent of a bankrupt, must pay and deliver to the trustee all money and securities in his possession or power as such officer, banker, attorney or agent, which he is not by law entitled to retain as against the bankrupt or the trustee. If he does not, he is guilty of a contempt of court and may be punished accordingly on the application of the trustee (*t*).

Seizure of bankrupt's property.

304. Any person acting under a warrant of the court may seize any part of the property of a bankrupt in the custody or possession of the bankrupt, or of any other person, and with a view to such seizure may break open any house, building, or room of the bankrupt where the bankrupt is supposed to be, or any building or receptacle of the bankrupt where any of his property is supposed to be; and when the court is satisfied that there is reason to believe that property of the bankrupt is concealed in a house or place not belonging to him, the court may, if it thinks fit, grant a search warrant to any constable or officer of the court who may execute it according to its tenor (*a*).

Sequestration of benefice.

305. Where a bankrupt is a beneficed clergyman, the trustee may apply for a sequestration of the profits of the benefice, and the certificate of the appointment of the trustee (*b*) is to be sufficient authority for the granting of sequestration without any writ or other proceeding, and the sequestration is accordingly to be issued as on

(*s*) Bankruptcy Act, 1883 (46 & 47 Vict. c. 52), s. 50 (5). It was decided by JESSEL, M.R., in *Palmer* v. *Locke* (1881), 18 Ch. D. 381, under the Bankruptcy Act, 1869 (32 & 33 Vict. c. 71), that an assignee of an equitable chose in action after the bankruptcy could, by giving notice or obtaining a stop-order, gain priority over the trustee. The Court of Appeal, while affirming the judgment of JESSEL, M.R., gave no decision on this point, but held that such an assignment should not be omitted from the abstract of title of the trustee on his selling the chose in action. The decision of JESSEL, M.R., has been followed in *Re Stone*, [1893] W. N. 50, under the Act of 1883, by CHITTY, J., who held that there was nothing in the Bankruptcy Act, 1883, when vesting a bankrupt's equitable choses in action in the trustee in bankruptcy, to relieve him from the effect of the rules of equity as to perfecting his title by notice to the holder of the fund. As regards legal choses in action, no notice is necessary (*Gibbon* v. *Dudgeon* (1881), 45 J. P. 748). WRIGHT, J., held that a trustee in bankruptcy was not in the position of an assignee or incumbrancer for value, and that, being only a statutory assignee, he could not by giving notice gain priority over an assignee for value before the bankruptcy who had not given notice (*Re Wallis, Ex parte Jenks*, [1902] 1 K. B. 719). Choses in action acquired after the adjudication stand on a different footing, see p. 167, *ante*, and as regards these the trustee, by giving notice, gets priority over a previous assignee for value (*Mercer* v. *Vans Colina*, [1900] 1 Q. B. 130, n.; *Re Beall, Ex parte Official Receiver*, [1899] 1 Q. B. 688). *Quære* whether as regards after-acquired choses in action a person claiming under an assignment for value after the intervention of the trustee can gain priority over the trustee by giving notice.

(*t*) Bankruptcy Act, 1883 (46 & 47 Vict. c. 52), s. 50 (6). See Bankruptcy Rules, Appendix, Forms, Nos. 155, 161, 163.

(*a*) Bankruptcy Act, 1883 (46 & 47 Vict. c. 52), s. 51. As to the execution of warrants, see *ibid.*, s. 119, Bankruptcy Rules, rr. 83 and 91, Appendix, Forms, Nos. 146, 147.

(*b*) See Bankruptcy Act, 1883 (46 & 47 Vict. c. 52), s. 21 (2)

SUB-SECT. 7. Realisation of Property.

a writ of *levari facias* founded on a judgment against the bankrupt, and has priority over any other sequestration issued after the commencement of the bankruptcy (*c*) in respect of a debt provable in the bankruptcy, except a sequestration issued before the date of the receiving order by or on behalf of a person who at the time of the issue thereof had not notice of any act of bankruptcy committed by the bankrupt and available for grounding a receiving order against him (*d*).

Stipend appointed to bankrupt by bishop.

The bishop of the diocese in which the benefice is situate may appoint to the bankrupt such stipend as he might by law have appointed to a curate duly licensed to serve the benefice in case the bankrupt had been non-resident (*e*), and the sequestrator is to pay the sum so appointed out of the profits of the benefice by quarterly instalments while the bankrupt performs the duties of the benefice (*f*).

Duties performed before receiving order.

The sequestrator is also to pay out of the profits of the benefice the salary, not exceeding £50, payable to any duly licensed curate of the church of the benefice in respect of duties performed by him as such during four months before the date of the receiving order (*g*).

These provisions are not to prejudice the operation of the Ecclesiastical Dilapidations Act, 1871 (*h*), or the Sequestration Act, 1871 (*i*), or any mortgage or charge duly created under any Act of Parliament before the commencement of the bankruptcy on the profits of the benefice (*j*).

Appropriation of salaries etc.

306. Where a bankrupt is an officer of the army or navy, or an officer or clerk or otherwise employed or engaged in the civil service of the Crown, the trustee is to receive for distribution amongst the creditors so much of the bankrupt's pay or salary as the court, on the application of the trustee, with the consent of the chief officer of the department under which the pay or salary is enjoyed, may direct; before making any such order the court is to communicate with the chief officer of the department as to the amount, time, and

(*c*) See p. 181, *ante*, as to "commencement of the bankruptcy."

(*d*) Bankruptcy Act, 1883 (46 & 47 Vict. c. 52), s. 52 (1). As to what is an available act of bankruptcy, see p. 13, *ante*.

(*e*) See Pluralities Act, 1838 (1 & 2 Vict. c. 106), s. 75, and title ECCLESIASTICAL LAW.

(*f*) Bankruptcy Act, 1883 (46 & 47 Vict. c. 52), s. 52 (2).

(*g*) *Ibid.*, s. 52 (3).

(*h*) 34 & 35 Vict. c. 43; see title ECCLESIASTICAL LAW.

(*i*) 34 & 35 Vict. c. 45; see title ECCLESIASTICAL LAW.

(*j*) Bankruptcy Act, 1883 (46 & 47 Vict. c. 52), s. 52 (4). A mortgage or a charge on pew-rents is not a mortgage or charge duly created under an Act of Parliament, and would be invalid as against the trustee (*Ex parte Arrowsmith, Re Leveson* (1878), 8 Ch. D. 96). As to the effect of a sequestration under s. 53, see *Lawrence* v. *Adams* (1896), 75 L. T. 410; *Lawrence* v. *Edwards*, [1891] 1 Ch. 144; *Re Lawrence*, [1896] P. 244. By the Benefices Act, 1898 (61 & 62 Vict. c. 48), s. 10, in the case of incumbents presented or collated after January 1, 1899, if the benefice of any such incumbent is sequestrated on bankruptcy within twelve months after his institution, or if such sequestration, if issued after that period, continues for the space of one whole year, or if any such incumbent incurs two such sequestrations in the space of two years, the benefice, unless the bishop otherwise directs, is to become void.

manner of the payment to the trustee, and is to obtain the written consent of the chief officer to the terms of such payment (*k*).

Where a bankrupt is in the receipt of a salary or income other than as aforesaid, or is entitled to any half-pay or pension, or to any compensation granted by the Treasury, the court, on the application of the trustee, is from time to time to make such order as it thinks just for the payment of the salary, income, half-pay, pension or compensation, or of any part thereof, to the trustee to be applied by him in such manner as the court may direct. These provisions do not take away or abridge the power of the chief officer of any public department to dismiss a bankrupt, or to declare the half-pay, pension, or compensation of any bankrupt to be forfeited (*l*).

SUB-SECT. 8.—*Disclaimer and Vesting Orders.*

What property may be disclaimed.

307. Where any part of the property of the bankrupt consists of land of any tenure burdened with onerous covenants, of shares or stock in companies, of unprofitable contracts, or of any other property that is unsaleable, or not readily saleable, by reason of the possessor being bound to the performance of any onerous act, or to the payment of any sum of money, the trustee, although he may have endeavoured to sell or may have taken possession of the property, or exercised any act of ownership in relation to it, may at any time within twelve months after his first appointment as trustee disclaim the property (*m*) ; and where such property has not come

(*k*) Bankruptcy Act, 1883 (46 & 47 Vict. c. 52), s. 53 (1). The trustee is to give to the bankrupt notice of his intention to apply (Bankruptcy Rules, r. 79, Appendix, Forms, No. 133). A copy of the proposed order is to be sent by the registrar to the chief officer of the department (*ibid.*, r. 80).

(*l*) Bankruptcy Act, 1883 (46 & 47 Vict. c. 52), s. 53 (2), (3). When an order is made under s. 53 (2), the registrar is to give to the trustee a sealed copy of the order, and the trustee is to communicate it to the chief of the department or other persons under whom the pay, income etc. is enjoyed (Bankruptcy Rules, r. 81). If the bankrupt ceases to receive a salary or income of the amount he received when the order was made, he may apply to the court to have the order rescinded or the amount ordered to be paid reduced (*ibid.*, r. 82). In making an appropriation of income for the benefit of creditors, the Court acts on the principle of giving to the creditors the surplus after allowing to the bankrupt sufficient for his proper maintenance according to his condition of life. See *Re Graydon, Ex parte Official Receiver*, [1896] 1 Q. B. 417 ; *Mercer* v. *Vans Colina*, [1900] 1 Q. B. 130, n., *per* WRIGHT, J., at p. 131. As to instances of orders made under this section and under the corresponding section (s. 90) of the Bankruptcy Act, 1869 (32 & 33 Vict. c. 71), see *Ex parte Huggins, Re Huggins* (1882), 21 Ch. D. 85 ; *Re Rogers, Ex parte Collins*, [1894] 1 Q. B. 425 ; *Re Brindley, Ex parte Brindley* (1887), 4 Morr. 104 ; *Re Mirams*, [1891] 1 Q. B. 594 ; *Re Shine, Ex parte Shine*, [1892] 1 Q. B. 522 ; *Re Saunders, Ex parte Saunders*, [1895] 2 Q. B. 424 ; *Re Ward, Ex parte Ward*, [1897] 1 Q. B. 266 ; *Re Sir William Young, Ex parte Haydon* (1898), 5 Mans. 85 ; as to instances where orders have been refused, see *Ex parte Benwell, Re Hutton* (1885), 14 Q. B. D. 301 ; *Re Jones, Ex parte Lloyd*, [1891] 2 Q. B. 231 ; *Re Hurrell, Ex parte Official Receiver* (1895), 12 T. L. R. 133 ; *Ex parte Wicks, Re Wicks* (1881), 17 Ch. D. 70 ; *Ex parte Webber, Re Webber* (1886), 18 Q. B. D. 111. An order of discharge puts an end to the operation of an order appropriating income or salary, unless the order expressly provides, as it may, for the continuance of the appropriation after the discharge (*Re Gold, Ex parte Gold* (1891), 8 Morr. 45).

(*m*) Bankruptcy Act, 1883 (46 & 47 Vict. c. 52), s. 55 (1) ; Bankruptcy Act, 1890 (53 & 54 Vict. c. 71), s. 13. The limitation of twelve months

SUB-SECT. 8. Disclaimer and Vesting Orders.

to the knowledge of the trustee within one month after his first appointment, he may disclaim it at any time within twelve months after he first became aware thereof (*n*). The disclaimer must be in writing signed by the trustee, and in the case of leasehold property must be filed with the proceedings in court (*o*).

Effect of disclaimer

308. The disclaimer operates to determine, as from its date, the rights, interests, and liabilities of the bankrupt and his property in or in respect of the property disclaimed, and discharges the trustee from all personal liability in respect of such property as from the

does not apply to the official receiver when there is no trustee appointed by the creditors, and it seems that in such a case there is no limitation of time within which the official receiver must disclaim (*Re Cohen*, [1905] 2 K. B. 704). In *Re Baker, Ex parte Official Receiver, Re Bake, Ex parte Axford* (1891), 8 Morr. 116, where it was held that the official receiver after the lapse of more than six years from the adjudication could not disclaim without the leave of the court extending the time, the point as to the difference between the positions of the official receiver and the creditors' trustee was not taken or discussed. *Re Baker, supra*, is inconsistent with *Re Cohen, supra*, and can no longer be treated as an authority on the question of the official receiver requiring extension of time for leave to disclaim. The period of twelve months may be extended by the court (Bankruptcy Act, 1890, s. 13). See *Re Price, Ex parte Foreman* (1884), 13 Q. B. D. 466; *Re Page, Ex parte Mackay* (1884), 14 Q. B. D. 401; *Re Baker, Ex parte Official Receiver, Re Bake, Ex parte Axford, supra*. As to the costs of a trustee's application under this section, see *Re Procter*, [1891] 2 Q. B. 433.

(*n*) Bankruptcy Act, 1883 (46 & 47 Vict. c. 52), s. 55 (1), proviso, as amended by Bankruptcy Act, 1890 (53 & 54 Vict. c. 71), s. 13. The word "property" in this section has a larger meaning than "property of the bankrupt" as defined in s. 44 (*Re Maughan, Ex parte Monkhouse* (1885), 14 Q. B. D. 956, *per* FIELD, J., at p. 959), and includes any property as defined by s. 168, and therefore a lease which the bankrupt had agreed to sell (*Re Maughan, supra*, but see *Re Gee, infra*).

The equity of redemption in a lease which has been assigned by way of mortgage is not the subject of disclaimer, as the trustee is under no liability under the covenants of the lease (*Re Gee, Ex parte Official Receiver* (1889), 24 Q. B. D. 65). An agreement for a lease can be disclaimed (*Re Maughan, Ex parte Monkhouse, supra*). The trustee may disclaim freehold property if it is burdened with onerous covenants (*Re Mercer and Moore* (1880), 14 Ch. D. 287; *Re Thomas, Ex parte Commissioners of Woods and Forests* (1888), 21 Q. B. D. 380, 383). Sect. 55 binds the Crown, and the trustee may disclaim onerous property granted by the Crown (*Re Thomas, supra*). If he disclaims any property, he must disclaim the whole, and cannot take part and disclaim part (*Ex parte Allen, Re Fussell* (1882), 20 Ch. D. 341).

The trustee cannot disclaim a contract for the sale of leasehold property unless he disclaims the lease itself (*Re Bastable, Ex parte the Trustee*, [1901] 2 K. B. 518), nor can he by disclaimer prejudice the rights of a person to whom the bankrupt has contracted to sell land (*Pearce* v. *Bastable's Trustee in Bankruptcy*, [1901] 2 Ch. 122), or the rights of an equitable mortgagee (*Ex parte Buxton, Re Müller* (1880), 15 Ch. D. 289). It is doubtful whether the right to disclaim extends to after-acquired property of the bankrupt (*Re Clayton and Barclay*, [1895] 2 Ch. 212, per CHITTY, J., at p. 216; *Ex parte Allen, Re Fussell, supra*). As to disclaiming a lease that has been determined, see *Ex parte Paterson, Re Throckmorton* (1879), 11 Ch. D. 908, and *Ex parte Sir W. Hart Dyke, Re Morrish* (1882), 22 Ch. D. 410, both decided under the Bankruptcy Act, 1869 (32 & 33 Vict. c. 71), the effect of which as regards the date when the disclaimer operates was different from that of the present Act. As to the history of the legislation relating to disclaimer, see *Hill* v. *East and West India Dock Co.* (1884), 9 App. Cas. 448, *per* Lord BRAMWELL, at p. 461, n.

(*o*) Bankruptcy Act, 1883 (46 & 47 Vict. c. 52), s. 55 (1); Bankruptcy Act, 1890 (53 & 54 Vict. c. 71), s. 13; Bankruptcy Rules, r. 320 (4). For forms of disclaimer, see *ibid.*, Appendix, Forms, Nos. 120—120 D.

SUB-SECT. 8. Disclaimer and Vesting Orders.

date when it vested in him, but, except so far as is necessary for the purpose of releasing the bankrupt and his property and the trustee from liability, does not affect the rights or liabilities of any other person (*p*).

Disclaimer of lease.

309. A trustee cannot disclaim a lease without the leave of the court, except in cases which may be prescribed by general rules, and the court may, before or on granting such leave, require such notices to be given to persons interested, and impose such terms as a condition of granting leave, and make such orders with respect to fixtures, tenant's improvements, and other matters arising out of the tenancy, as the court thinks just (*q*).

A lease may be disclaimed without the leave of the court (1) when the bankrupt has not sublet the demised premises or any part or mortgaged or charged the lease, and (a) the rent reserved and real value of the property leased, as ascertained by the property tax assessment, are less than £20 per annum, or (b) the estate is administered as a small bankruptcy (*r*), or (c) the trustee serves the lessor with notice of his intention to disclaim, and the lessor does not within seven days after the receipt of such notice give notice to the trustee requiring the matter to be brought before the court; (2) when the bankrupt has sublet the demised premises or mortgaged or charged the lease, and the trustee serves the lessor and the sub-lessee or the mortgagees with notice of his intention to disclaim, and neither the lessor nor the sub-lessee or the mortgagees, or any of them, within fourteen days after the receipt of such notice require the matter to be brought before the court (*s*).

(*p*) Bankruptcy Act, 1883 (46 & 47 Vict. c. 52), s. 55 (2). Disclaimer releases the trustee from all personal liability under a lease, even if he has entered and paid rent (*Ex parte Allen, Re Fussell* (1882), 20 Ch. D. 341; *Gabriel* v. *Blankenstein* (1884), 13 Q. B. D. 684; but see *Lybbe* v. *Hart* (1885), 29 Ch. D. 8). As to the liabilities of persons other than the trustee and the bankrupt, see *Ex parte Walton, Re Levy* (1881), 17 Ch. D. 746; *Hill* v. *East and West India Dock Co.* (1884), 9 App. Cas. 448; *Stein* v. *Pope*, [1902] 1 K. B. 595. Disclaimer relieves a surety for rent from liability to rent due after the disclaimer (*Stacey* v. *Hill*, [1901] 1 K. B. 660). A trustee who has disclaimed a lease of agricultural land is none the less bound by the provisions of the Sale of Farming Stock Act, 1816 (56 Geo. 3, c. 50), s. 11, and if there is a covenant in the lease against the removal of hay etc., the trustee will be bound by it even after disclaimer (*Lybbe* v. *Hart, supra;* see *per* CHITTY, J., at p. 15). If he removes hay etc., and afterwards disclaims, he remains liable (*Schofield* v. *Hincks* (1888), 58 L. J. (Q. B.) 147). See title AGRICULTURE, Vol. I., p. 275.

(*q*) Bankruptcy Act, 1883 (46 & 47 Vict. c. 52), s. 55 (3). For forms of notices, see Bankruptcy Rules, Appendix, Forms, Nos. 119 A, 119 B.

(*r*) See Bankruptcy Act, 1883 (46 & 47 Vict. c. 52), s. 121, p. 294, *post.*

(*s*) Bankruptcy Rules, r. 320 (1). Where leave is not required, no terms can be imposed (*Re Sandwell, Ex parte Zerfass* (1885), 14 Q. B. D. 960).

As regards the terms on which leave will be granted to a trustee to disclaim a lease, the court will not order compensation to the landlord where the trustee has been in possession of the demised premises, unless his occupation has actually produced profit to the bankrupt's estate and he retained possession with a view to producing such profit (*Ex parte Isherwood, Re Knight* (1882), 22 Ch. D. 384; *Ex parte Arnal, Re Witton* (1883), 24 Ch. D. 26; *Re Zappert & Co., Ex parte the Trustee* (1884), 1 Morr. 72; *Re T. Brooke,*

SUB-SECT. 8. **Disclaimer and Vesting Orders.**

Disclaimer after application by person interested.

310. A trustee cannot disclaim any property in any case where an application in writing has been made to him by any person interested in the property requiring him to decide whether he will disclaim or not, and the trustee has for a period of twenty-eight days after the receipt of the application, or such extended period as may be allowed by the court, declined or neglected to give notice whether he disclaims the property or not; and in the case of a contract, if the trustee after such application does not within the said period or extended period disclaim the contract, he shall be deemed to have adopted it (*t*).

Order rescinding contract.

311. The court may, on the application of any person who is, as against the trustee, entitled to the benefit or subject to the burden of a contract made with the bankrupt, make an order rescinding the contract on such terms as to payment by or to either party of damages for the non-performance of the contract, or otherwise, as to the court may seem equitable, and any damages payable under the order to any such person may be proved by him as a debt under the bankruptcy (*u*).

Order vesting disclaimed property.

312. The court may, on application by any person either claiming any interest in any disclaimed property, or under any liability not

Ex parte the Trustee (1884), 1 Morr. 82; *Re Crowther, Ex parte Duff* (1887), 4 Morr. 100). In *Re Moser* (1884), 13 Q. B. D. 738, the order made was that the landlord should either pay a fair sum for the tenant's fixtures or allow the trustee to remove them, and that the trustee should pay rent until the fixtures were actually removed. For form of order, see *ibid.* at p. 739, S. C. 1 Morr. 245, the two reports differing slightly as to the order made. In *Ex parte Good, Re Salkeld* (1884), 13 Q. B. D. 731, the trustee had been in beneficial occupation of the demised premises, and a co-lessee and former partner of the bankrupt had been forced by the landlord to pay the rent. It was held that, as the rent had not been paid, and the trustee would not have been allowed to disclaim without paying rent to the landlord, the co-lessee was entitled to be indemnified by the trustee for his payment of rent.

In an application for leave to disclaim, several properties held under one landlord may be included in one application, and any number of mortgagees or sub-lessees who are interested in the property may be joined, but when there are different landlords, there must be different applications (*Re Whitaker* (1888), 21 Q. B. D. 261). If the court gives the trustee unconditional leave to disclaim, the lessor, if he wishes to appeal, should apply for a stay of proceedings; if the disclaimer be executed, there can be no appeal against the order giving leave (*Ex parte Sadler, Re Hawes* (1881), 19 Ch. D. 122). Notice of the motion for leave to disclaim may be served out of the jurisdiction (*Re Rathbone, Ex parte Paterson* (1887), 4 Morr. 270).

(*t*) Bankruptcy Act, 1883 (46 & 47 Vict. c. 52), s. 55 (4). The person claiming to be interested must, at the request of the official receiver or trustee, furnish a statement of the interest claimed by him (Bankruptcy Rules, r. 320 (7)). As to application by the trustee for extension of time, see *Re Richardson, Ex parte Harris* (1880), 16 Ch. D. 613. If the trustee declines or neglects to give notice within the twenty-eight days, he may render himself personally liable for the rent and for costs (*Re Page, Ex parte Mackay* (1884), 14 Q. B. D. 401). Time runs, not from the posting of the application, but from its receipt (*Reed* v. *Harvey* (1880), 5 Q. B. D. 184). See, as to extension of time, Bankruptcy Act, 1883, s. 105 (4). A trustee in bankruptcy may, although he does not disclaim, rid himself of liability under a lease by assigning it to a pauper (*Hopkinson* v. *Lovering* (1883), 11 Q. B. D. 92; see *Wilkins* v. *Fry* (1816), 1 Mer. 244, at p. 265; *Re Johnson & Stephens, Ex parte Blackett* (1894), 1 Mans. 54).

(*u*) Bankruptcy Act, 1883 (46 & 47 Vict. c. 52), s. 55 (5). This provision must be confined to contracts which pass to the trustee (see p. 162, *ante*).

SUB-SECT. 8. Disclaimer and Vesting Orders.

discharged by the Bankruptcy Act, 1883, in respect of any disclaimed property, and on hearing such persons as it thinks fit, make an order for the vesting of the property in or delivery thereof to any person entitled thereto, or to whom it may seem just that the same should be delivered by way of compensation for such liability, or to a trustee for him, and on such terms as the court thinks just; and on such order being made, the property vests accordingly in the person therein named in that behalf without any conveyance or assignment for the purpose (*v*). But where the property disclaimed is of a leasehold nature, the court may not make a vesting order in favour of any person claiming under the bankrupt, whether as under-lessee or as mortgagee by demise, except upon the terms of making him subject to the same liabilities and obligations as the bankrupt was subject to under the lease in respect of the property at the date when the bankruptcy petition was filed; and any mortgagee or under-lessee declining to accept a vesting order upon such terms must be excluded from all interest in and security upon the property. If no person claiming under the bankrupt is willing to accept an order upon such terms, the court has power to vest the bankrupt's estate and interest in the property in any person liable either personally or in a representative character, and either alone or jointly with the bankrupt, to perform the lessee's covenants in such lease, freed and discharged from all estates, incumbrances and interests created therein by the bankrupt (*w*). The court has, however (*x*), power to modify such terms so as to make the person in whose favour the vesting order may be made subject only to the same liabilities and obligations as if the lease had been assigned to him at the date when the bankruptcy petition was filed, and (if the case so requires) as if the lease had comprised only the property comprised in the vesting order (*y*).

(*v*) Bankruptcy Act, 1883 (46 & 47 Vict. c. 52), s. 55 (6). The intention of the Legislature in cases of disclaimer by the trustee was to provide for the relief of the trustee from liability in respect of onerous obligations of the bankrupt, and to do so with as little disturbance as might be of the rights and liabilities of third persons by reason of the disclaimer. See s. 55 (2). The first clause of s. 55 (6) is introduced for the purpose of working out, as regards onerous property generally, the declaration of the Legislature as to the rights of third persons in s. 55 (2) (*Re Carter & Ellis, Ex parte Savill Brothers*, [1905] 1 K. B. 735, *per* VAUGHAN WILLIAMS, L.J., at pp. 742 and 744).

(*w*) Bankruptcy Act, 1883 (46 & 47 Vict. c. 52), s. 55 (6). The second clause of s. 55 (6) deals with the particular case of leases. The effect of this proviso was that a mortgagee by sub-demise might be called upon to elect whether he would take upon himself the liability of the lessor or be excluded from all interest in the disclaimed property (*Re Finley, Ex parte Clothworkers' Co.* (1888), 21 Q. B. D. 475; see *Re Smith, Ex parte Hepburn* (1890), 25 Q. B. D. 536). As the whole object of taking a mortgage of a lease by sub-demise is to prevent the mortgagee from becoming liable to the rent and to the performance of the covenants of the original lease, the provisions of s. 55 (6) seriously affected the security of a mortgagee by sub-demise. As it was found that these provisions might work injustice, s. 13 of the Bankruptcy Act, 1890 (53 & 54 Vict. c. 71), was passed. See note (*y*), *infra*.

(*x*) Bankruptcy Act, 1890 (53 & 54 Vict. c. 71), s. 13.

(*y*) *Re William Walker* (1895), 2 Mans. 60. The liberty given by s. 13 of the Bankruptcy Act, 1890, to modify the terms of the proviso to s. 55 (6) was exercised by the Court of Appeal in *Re Carter & Ellis, Ex parte Savill Brothers*, [1905] 1 K. B. 735. An order was made vesting certain leases in mortgagees

SUB-SECT. 8. **Disclaimer and Vesting Orders.**

Notice of the application should be given as the court directs, but a lessor, if not the applicant, should, as a rule, be served (*z*); and no order will affect persons not served (*a*).

Rights of person injured by disclaimer.

313. Any person injured by the operation of this statutory disclaimer is deemed a creditor of the bankrupt to the extent of the injury, and may accordingly prove the same as a debt under the bankruptcy (*b*).

by sub-demise, "subject only to the same liabilities and obligations as if the leases had been assigned to them at the date when the bankruptcy petition was filed." The effect of this limitation was to give liberty to the mortgagees to get rid of their liability by assignment as well as to limit their liability to breaches of covenant that occurred after the filing of the bankruptcy petition (*Re Carter & Ellis, supra*, at p. 750; *Re William Walker* (1895), 2 Mans. 60, at p. 64). Sect. 13 also enables the court to apportion the covenants in the case of a mortgagee being interested in part only of the demised property (*ibid.*). The court has a discretion, and is not obliged to make the modifications referred to in the section; but if the exercise of the discretion in favour of the mortgagee will place him in no better position and will place the lessor in no worse position than if there had been no disclaimer, the discretion ought to be exercised in favour of the mortgagee (*Re Carter & Ellis, supra*) Any person interested may apply, *e.g.*, parties claiming under the bankrupt, the lessor (*Re Cock, Ex parte Shilson* (1887), 20 Q. B. D. 343; *Re Finley, Ex parte Clothworkers' Co.* (1888), 21 Q. B. D. 475; *Re Britton* (1889), 6 Morr. 130; *Re Baker, Ex parte Lupton*, [1901] 2 K. B. 628), or the lessee who, owing to the bankruptcy of an assignee of the lease, is compelled to pay the rent (*Re Morgan, Ex parte Morgan* (1889), 22 Q. B. D. 592).

(*z*) *Re Morgan, supra.*

(*a*) *Re Baker, Ex parte Lupton, supra.* Where the assignee of a lease becomes bankrupt, and his trustee disclaims the lease, the lessor can apply for an order excluding the sub-lessee of the bankrupt from all interest in the property, unless he elects to take a vesting order, although the original lessee remains liable on the covenants in the lease, and has not been served with notice of the application (*Re Baker, Ex parte Lupton, supra*). The lessee in such a case, if the under-lessee does not accept the vesting order, may apply for an order vesting the property in himself (*ibid.*).

The court has full jurisdiction to decide all questions of law and fact arising on the application, including the question whether the lease is subsisting or has been merged by a temporary coalescence of the freehold and leasehold estates in the lessee (*Lea* v. *Thursby*, [1904] 2 Ch. 57).

Applications for vesting orders are made to the registrar in chambers, and are supported by an affidavit showing the interest of the applicant in the premises. Notice of the motion, with a copy of the affidavit, should be given to each person interested. On the hearing of the application the usual practice is to offer the vesting order to the last incumbrancer. If he accepts it and satisfies the court of his title, then an order is made vesting the lease in him subject to the earlier incumbrances. If he wishes to have it with the modifications permitted by s. 13 of the Bankruptcy Act, 1890, he must show ground for this, otherwise the order will be made subject to the conditions in s. 55 (6) of the Bankruptcy Act, 1883. If the incumbrancer to whom the vesting order is offered declines to accept it, then the order excludes him from all interest in the property (Chalmers and Hough's Bankruptcy Acts, 1883 to 1890, 6th ed. p. 136).

(*b*) Bankruptcy Act, 1883 (46 & 47 Vict. c. 52), s. 55 (7). In *Ex parte Llynvi Coal and Iron Co., Re Hide* (1871), 7 Ch. App. 28, it was held that where the bankrupt had agreed to take a lease for ten years the measure of damages caused by the disclaimer of the agreement was the difference between the rent paid under the agreement and what they could at the time of the disclaimer get for the property. On the disclaimer of a lease with a covenant to repair the measure of damages suffered by the landlord is the diminution of the rent and the amount necessary to put the house in repair (*Ex parte Blake, Re McEwan* (1879), 11 Ch. D. 572; *Re Carruthers, Ex parte Tobit* (1895), 2 Mans. 172); on the

SECT. 11.—*Proof of Debts.*

SUB-SECT. 1.

SUB-SECT. 1.—*Debts provable in Bankruptcy.*

Debts Provable in Bankruptcy.

Effect of bankruptcy on creditor's rights.

314. When a person has become bankrupt, the rights which before the bankruptcy his creditors enjoyed of enforcing their claims against him and his property cease to be enforceable, and in their place the creditors acquire a right to share equally and proportionately in the distribution by the trustee in bankruptcy of the assets which become vested in him (*c*). The debts and claims in respect of which creditors become thus entitled are termed provable debts, and the method by which their claims are asserted and established is called proof.

Provable debts.

315. With certain exceptions the debts provable in bankruptcy include all debts and liabilities, present or future (*d*), certain or contingent, to which the debtor is subject at the date of the receiving order, or to which he may become subject before his discharge by reason of any obligation incurred before the date of the receiving order (*e*). The term "liability" includes any compensation for work and labour done, any obligation or possibility of an obligation to pay money or money's worth on the breach of any express or implied covenant, contract, agreement, or undertaking, whether the breach does or does not occur, or whether it is or is not likely to occur or capable of occurring before the discharge of the debtor; and generally it includes any express or implied engagement, agreement, or undertaking, resulting or capable of resulting in an obligation to pay money or money's worth, whether the payment is, as respects amount, fixed or unliquidated, as respects time, present or future, certain or dependent on any one contingency or on two or more contingencies, as to mode of valuation, capable of being ascertained by fixed rules or as matter of opinion (*f*).

Debts not provable.

316. There are three classes of debts and liabilities which are not provable in bankruptcy, namely, (1) demands in the nature of unliquidated damages which arise otherwise than by reason of a contract, promise, or breach of trust; (2) debts and liabilities contracted by the debtor with a creditor who has notice of an available act of bankruptcy; (3) contingent debts and liabilities which in the opinion of the court are incapable of being fairly estimated (*g*).

disclaimer of shares the measure of damages is the amount unpaid on the shares less the value of any advantages which may accrue from them (*Re Hallett, Ex parte National Insurance Corporation* (1894), 1 Mans. 380). As to damages on disclaimer of a contract to take up shares, see *Re Hooley, Ex parte United Ordnance and Engineering Co.*, [1899] 2 Q. B. 579. If a trustee disclaims a contract to purchase land, the vendor is entitled to retain the deposit even if there is no stipulation as to forfeiture of the deposit (*Ex parte Barrell, Re Parnell* (1875), 10 Ch. App. 512).

(*c*) *Re Higginson & Dean, Ex parte A.-G.*, [1899] 1 Q. B. 325, *per* WRIGHT, J., at p. 333.

(*d*) See *Ex parte Stone, Re Welch* (1873), 8 Ch. App. 914.

(*e*) Bankruptcy Act, 1883 (46 & 47 Vict. c. 52), s. 37 (3).

(*f*) *Ibid.*, s. 37 (8).

(*g*) *Ibid.*, s. 37 (1), (2), (6).

SUB-SECT. 1. Debts Provable in Bankruptcy.

(1) Unliquidated damages.

317. As to the first of the above classes, the unprovable liabilities include damages for assault and battery (*h*), for trover (*i*), for seduction (*j*), and for misrepresentations in the prospectus of a company (*k*). If, however, unliquidated damages coming within this class have become liquidated before the receiving order either by agreement (*l*), or by a reference and award (*m*), or by a final judgment (*n*), they are provable.

Claims either in tort or contract.

Where from the nature of the case a claim may be made either in tort or in contract, the tort may be waived and proof made on the contract (*o*). Even if in an action of tort judgment against the debtor has been signed after the receiving order, this does not necessarily mean a final election on the part of the plaintiff, and he may abandon the judgment and prove for breach of contract by the debtor (*p*).

Judgment for money in default of delivery of chattel.

But where in an action of detinue judgment has been given for a certain sum in default of delivery of a chattel, the plaintiff cannot prove for the money until execution has been issued (*q*).

Fraud.

Further, there may be cases where unliquidated damages are provable though the debtor has been guilty of fraud. Thus a fraudulent misrepresentation made on the sale of a chattel may be treated as a breach of the obligation arising out of the contract of sale (*r*); and money obtained by fraud may be followed and proved for in bankruptcy (*s*).

(2) Debts contracted with notice of act of bankruptcy.

318. With regard to debts and liabilities contracted with a creditor who has notice of an available act of bankruptcy, the creditor can neither prove for them nor recover them afterwards by action even if they would but for such notice be provable (*t*).

(3) Contingent debts.

319. If contingent debts and liabilities are provable, it is the duty of the trustee to make an estimate of their value, subject to a right to appeal to the court. If the court thinks that a debt

(*h*) *Walter* v. *Sherlock* (1771), 3 Wils. 272.

(*i*) *Parker* v. *Norton* (1796), 6 Term Rep. 695.

(*j*) *Buss* v. *Gilbert* (1813), 2 M. & S. 70.

(*k*) *Re Giles, Ex parte Stone* (1889), 61 L. T. 82. See also *Goodtitle* v. *North* 1781), 2 Doug. 584; *Parker* v. *Crole* (1828), 5 Bing. 63.

(*l*) *Ex parte Mumford* (1808), 15 Ves. 289.

(*m*) *Ex parte Harding, Re Pickering* (1854), 5 De G. M. & G. 367.

(*n*) *Re Newman, Ex parte Brooke* (1876), 3 Ch. D. 494. A verdict is not sufficient (*ibid.*). Compare, however, *Re British Gold Fields of West Africa*, [1899] 2 Ch. 7, at p. 11.

(*o*) *Parker* v. *Norton* (1796), *supra*, *per* Lord KENYON, at p. 699; *De Tastet* v. *Walker* (1818), Buck, 153.

(*p*) *Re Hopkins, Ex parte De Stedingk* (1902), 86 L. T. 676. Compare *Ex parte Baum, Re Edwards* (1874), 9 Ch. App. 673.

(*q*) *Re Scarth* (1874), 10 Ch. App. 234.

(*r*) *Jack* v. *Kipping* (1882), 9 Q. B. D. 113. See also *Booth* v. *Hutchinson* (1872), L. R. 15 Eq. 30; *Peat* v. *Jones & Co.* (1881), 8 Q. B. D. 147.

(*s*) *Ex parte Adamson, Re Collie* (1878), 8 Ch. D. 807, at p. 819; *Emma Silver Mining Co.* v. *Grant* (1880), 17 Ch. D. 122 (secret profit received by promoter of company); *Watson* v. *Holliday* (1882), 20 Ch. D. 780, and on appeal 31 W. R. 536 (profits made by infringer of patent).

(*t*) *Buckwell* v. *Norman*, [1898] 1 Q. B. 622; *Seaton* v. *Lord Deerhurst*, [1895] 1 Q. B. 853 (gaming contract). As to notice, see p. 290, *post*.

SUB-SECT. 1. Debts Provable in Bankruptcy.

or liability is incapable of being fairly estimated, it may make an order to that effect, and thereupon the debt or liability will not be provable. If it thinks it is so capable, its value may be assessed by the court itself, without a jury, and thereupon the amount of the value becomes provable (*a*).

Generally, all contingent liabilities which may end in the payment of money, and which have not been declared incapable of being fairly estimated, are provable (*b*). Thus where the assignee of a lease becomes bankrupt the lessee or assignor who is liable in respect of the rent and covenants, and whom the bankrupt has covenanted or is liable to indemnify, may prove (*c*).

Where a lease is existing and has not been disclaimed the lessor cannot prove in the lessee's bankruptcy for rent which has not become due and payable (*d*).

Alimony.

Alimony ordered by a court to be paid periodically by a husband to a wife is not capable of being fairly estimated, for it may not last and may be varied (*e*); nor are arrears of alimony, whether accrued before or after the receiving order (*f*).

Other debts not provable.

320. There are some other liabilities which, though arising out of contract, are, according to judicial interpretation of the bankruptcy statutes, not provable, and so unaffected by an order of discharge. Thus, it seems, such contracts as a promise to marry not broken, a covenant not to molest, or not to carry on a particular trade, or a covenant in a marriage settlement to settle after-acquired chattels, or a contract or covenant which has a different object from the payment of money in any contingency, or for breach of which an injunction or specific performance would be the proper remedy, would not be provable (*g*).

(*a*) Bankruptcy Act, 1883 (46 & 47 Vict. c. 52), s. 37 (4), (5), (6), (7). The estimate made by the creditor is no part of the proof (*Re Dodds, Ex parte Vaughan's Executors* (1890), 25 Q. B. D. 529). See *Re Allen & Co., Ex parte Strong & Hanbury* (1893), 10 Morr. 84, where the value was ordered to be assessed by the registrar, and *Re Gieve, Ex parte Shaw* (1899), 80 L. T. 359 (value of an annuity). In *Re Hooley, Ex parte United Ordnance and Engineering Co.*, [1899] 2 Q. B. 579, the value of the liability was ordered to be assessed by the trustee.

(*b*) Bankruptcy Act, 1883 (46 & 47 Vict. c. 52), s. 37; *Hardy* v. *Fothergill* (1888), 13 App. Cas. 351. See, for other instances, *Re Allen & Co., Ex parte Strong & Hanbury* (1893), 10 Morr. 84 (breach of covenant to purchase goods for a certain number of years); *Re Gieve, Ex parte Shaw* (1899), 6 Mans. 249, 255 (where the court made an estimate); *Barnett* v. *King*, [1891] 1 Ch. 4 (liability to pay a sum out of estate after death).

(*c*) *Hardy* v. *Fothergill, supra; Re Hinks, Ex parte Verdi* (1886), 3 Morr. 218; *Re Carruthers, Ex parte Tobit* (1895), 2 Mans. 172; *Re Perkins*, [1898] 2 Ch. 182.

(*d*) Where there is no disclaimer the lessor may prove for breaches of covenant already incurred, and enter a claim for future rent (*Re New Oriental Bank Corporation* (No. 2), [1895] 1 Ch. 753). Compare, however, *Re Panther Lead Co.*, [1896] 1 Ch. 978, where a lessor, being willing to resume possession and treat the lease as determined, was allowed to prove in respect of all obligations, past and future, of the insolvent company under the lease.

(*e*) *Prescott* v. *Prescott* (1869), 20 L. T. 331; *Linton* v. *Linton* (1885), 15 Q. B. D. 239.

(*f*) *Re Hawkins, Ex parte Hawkins*, [1894] 1 Q. B. 25; *Kerr* v. *Kerr*, [1897] 2 Q. B. 439. See also *Watkins* v. *Watkins*, [1896] P. 222.

(*g*) *Hardy* v. *Fothergill, supra, per* Lord SELBORNE, at p. 360; *Re Reis*, [1904] 2 K. B. 769. Compare also *Collyer* v. *Isaacs* (1881), 19 Ch. D. 342.

SUB-SECT. 1
Debts Provable in Bankruptcy.

Illegality or absence of consideration.

321. Debts founded on an illegal consideration, such as the stifling of a prosecution (*h*), are not provable (*i*), but if the consideration is in part legal, proof in part may be allowed (*k*). But where a genuine debt has existed founded on an independent contract antecedent to such an illegal arrangement, proof may be allowed (*l*).

Proof may be allowed on a contract made abroad, though through a defect, such as want of registration of the contract, no remedy lies on it abroad (*m*); and a contract made by an unregistered society, requiring registration under the Companies Act, 1862 (*n*), with one of its members, may be proved on where the member has acquiesced in and ratified the subsequent registration of the company (*o*).

Agreement in fraud of other creditors.

A right of proof may be affected or lost where the agreement is in effect a fraud on the other creditors (*p*). But voluntary bonds entered into *bonâ fide* and in such circumstances as not to be a fraud on the creditors generally are provable *pari passu* with the other debts (*q*). A court, however, sitting in bankruptcy may always inquire into the consideration for a debt, even for a judgment debt, where there are grounds for suspicion, and this power of the court is not confined to cases where a petitioning creditor is asking for a receiving order (*r*).

(*h*) See title CONTRACTS. See also *Ex parte Thompson* (1746), 1 Atk. 125; *Ex parte Bell, Re Scott* (1813), 1 M. & S. 751; *Ex parte Schmaling, Re Aldebert & Co.* (1817), Buck, 93; *Ex parte Chevasse, Re Grazebrook* (1865), 13 W. R. 627; *Herman* v. *Jeuchner* (1885), 15 Q. B. D. 561; *Barclay* v. *Pearson*, [1893] 2 Ch. 154; *Hermann* v. *Charlesworth*, [1905] 2 K. B. 123; and see cases in note (*k*), *infra*.

(*i*) *Ex parte Bulmer* (1807), 13 Ves. 313.

(*k*) See *Re Mapleback, Ex parte Caldecott* (1876), 4 Ch. D. 150; *Ex parte Wolverhampton and Staffordshire Banking Co., Re Campbell* (1884), 14 Q. B. D. 32; *Flower* v. *Sadler* (1882), 10 Q. B. D. 572; *McClatchie* v. *Haslam* (1892), 65 L. T. 691; *Jones* v. *Merionethshire Permanent Benefit Building Society*, [1891] 2 Ch. 587, and on appeal [1892] 1 Ch. 173.

(*l*) *Ex parte Leslie, Re Guerrier* (1882), 20 Ch. D. 131.

(*m*) *Ex parte Melbourn, Re Melbourn* (1870), 6 Ch. App. 64. See also *Thurburn* v. *Stewart* (1871), L. R. 3 P. C. 478.

(*n*) 25 & 26 Vict. c. 89. See title COMPANIES.

(*o*) *Re Thomas, Ex parte Poppleton* (1884), 14 Q. B. D. 379.

(*p*) *Re Gomersall* (1875), 1 Ch. D. 137, affirmed *sub nom. Jones* v. *Gordon* (1877), 2 App. Cas. 616, where bills for £1,727 drawn on the bankrupts by their agent were bought by A., who had knowledge of the bankrupts' embarrassments, from a third party for £200, and A. was not allowed to prove for more than £200. See also *Ex parte Bloxham* (1801), 6 Ves. 449; *Ex parte Vere, Re Bentley* (1835), 2 Mont. & A. 137; *Hall* v. *Dyson* (1852), 17 Q. B. 785; *Nerot* v. *Wallace* (1789), 3 Term Rep. 17; *Murray* v. *Reeves* (1828), 8 B. & C. 421; *Kearley* v. *Thomson* (1890), 24 Q. B. D. 742; *Re McHenry*, [1904] 3 Ch. 365 (under Bankruptcy Act, 1869); *Ex parte Pottinger, Re Stewart* (1878), 8 Ch. D. 621.

(*q*) *Ex parte Pottinger, Re Stewart, supra; Re Coates, Ex parte Scott* (1892), 9 Morr. 87.

(*r*) *Ex parte Kibble, Re Onslow* (1875), 10 Ch. App. 373; *Ex parte Revell, Re Tollemache* (1884), 13 Q. B. D. 720; *Ex parte Edwards, Re Tollemache* (1884), 14 Q. B. D. 415; *Ex parte Bonham, Re Tollemache, ibid.* 604; *Ex parte Anderson, Re Tollemache, ibid.* 606; *Ex parte Lennox, Re Lennox* (1885), 16 Q. B. D. 315; *Re Flatau, Ex parte Scotch Whisky Distillers* (1888), 22 Q. B. D. 83; *Re Beauchamp, Ex parte Beauchamp*, [1904] 1 K. B. 572; *Re Van Laun, Ex parte Pattullo*, [1907] 1 K. B. 155, affirmed *sub nom. Re Van Laun, Ex parte Chatterton*, [1907] 2 K. B. 23. See also cases collected p. 57, *ante*.

As to going behind a judgment obtained by a compromise, see *Ex parte*

SUB-SECT. 1. Debts Provable in Bankruptcy.

Debts arising out of felonies.

322. Where a debt arises out of a felony committed by the bankrupt the person injured cannot prove in respect of it, unless he could have sued for it (*s*). So, too, no proof will be allowed where there has been a compromise or compounding of the felony (*t*). But proof may be allowed where the bankrupt has been brought to justice by another person injured by a similar offence (*a*), or where prosecution is impossible by reason of the death of the offender or his escape before a prosecution could have been by reasonable diligence begun (*b*), or where a prosecution in respect of some items of the debt has failed, or there is no chance of a conviction (*c*), or where it is not clear that a felony has been committed (*d*), or where the proof is made by the trustee in bankruptcy, or, it would appear, by the personal representatives, of the person injured by the felony (*e*).

Gaming debts.

323. A gaming debt is not provable even though judgment has been obtained in respect of it (*f*); and the assignee of such a debt is in no better position than the assignor (*g*). But proof may be made on an agreement the consideration for which is an undertaking to abstain from posting at the debtor's club his refusal to pay a gaming debt (*h*). Proof cannot be made for money lent to the bankrupt to game or bet with (*i*), nor for money paid at the bankrupt's request for bets lost by the bankrupt (*k*), nor for a moiety of

Banner, Re Blythe (1881), 17 Ch. D. 480; *Miles* v. *New Zealand Alford Estate Co.* (1886), 32 Ch. D. 266; *Re Hawkins, Ex parte Troup*, [1895] 1 Q. B. 404; *Law* v. *Law*, [1905] 1 Ch. 140.

The court will not go behind an assessment for taxes made against the bankrupt (*Re Calvert, Ex parte Calvert*, [1899] 2 Q. B. 145).

(*s*) See *Ex parte Ball, Re Shepherd* (1879), 10 Ch. D. 667, where the cases are collected, including *Ex parte Elliott* (1837), 2 Dea. 179; *Wellock* v. *Constantine* (1863), 2 H. & C. 146. Compare *Ex parte Leslie, Re Guerrier* (1882), 20 Ch. D. 131, where the debt was treated as independent of the felony; *Re M'Master* (1859), 32 L. T. (o. s.) 288, where a dividend was reserved on the creditor undertaking to prosecute. As to his remedy by action, see title ACTION, Vol. I., pp. 27—29.

(*t*) *Ex parte Elliott, supra*. Compare *Ex parte Leslie, supra*.

(*a*) *Ex parte Ball, supra; Marsh* v. *Keating* (1834), 1 Bing. (N. C.) 198, 217.

(*b*) *Ex parte Ball, supra; Stone* v. *Marsh* (1827), 8 B. & C. 551. See also *Crosby* v. *Leng* (1810), 12 East, 409.

(*c*) *Ex parte Jones, Re Jones* (1833), 2 Mont. & A. 193.

(*d*) *Ex parte Shaw* (1816), 1 Madd. 598; and see *Ex parte Elliott, supra*.

(*e*) *Ex parte Ball, supra*. These and similar cases have cast doubts on the rule requiring criminal before civil proceedings. See also *Wells* v. *Abrahams* (1872), L. R. 7 Q. B. 554; *Roope* v. *D'Avigdor* (1883), 10 Q. B. D. 412; *Appleby* v. *Franklin* (1885), 17 Q. B. D. 93. See further title ACTIONS, Vol. I., p. 28.

(*f*) *Re Lopes, Ex parte Hardaway & Topping* (1889), 6 Morr. 245. See title GAMING AND WAGERING.

(*g*) *Re Deerhurst, Ex parte Seaton* (1891), 8 Morr. 97.

(*h*) *Re Browne, Ex parte Martingell*, [1904] 2 K. B. 133.

(*i*) See *Ex parte Pyke, Re Lister* (1878), 8 Ch. D. 754.

(*k*) *Tatam* v. *Reeve*, [1893] 1 Q. B. 44. See the Gaming Act, 1892 (55 & 56 Vict. c. 9). Compare *Ex parte Pyke, Re Lister, supra*, where it was held that proof might be made for a loan to the bankrupt to enable him to pay money lost. This was not "money knowingly lent or advanced for gaming or betting" within the Gaming Act, 1835 (5 & 6 Will. 4, c. 41). In view of the Gaming Act, 1892, *supra*, it is submitted that this case is no longer law. See title GAMING AND WAGERING.

SUB-SECT. 1. Debts Provable in Bankruptcy.

a sum of money paid by the claimant to the bankrupt to meet losses on bets made by the bankrupt for him on joint account (*l*), nor for money paid to a stakeholder to abide the result of a wager at the request of the bankrupt to be repaid by the bankrupt if he wins, even though he has won (*m*).

Stakeholder.

But money deposited with a stakeholder to abide the result of a wager, being recoverable by the depositor before it has been paid over, is provable (*n*), and so is money received by an agent for his principal in respect of a wager (*o*).

"Differences."

324. No proof is allowed on a contract for "differences" between two stock dealers, though by the contract delivery of the stock might be insisted on (*p*), nor for stocks agreed to be given by the bankrupt to meet a balance admitted by him to be due on such contract (*q*), though proof may be made in respect of cover not required deposited by the creditor with the bankrupt as security (*r*). Again, proof may be made for differences paid by the creditor as broker for the bankrupt (*s*) or for differences received by the bankrupt as broker for the creditor (*t*).

Statute-barred debts.

325. A debt barred by the Statute of Limitations is not provable (*a*), but the statute does not affect a creditor's rights in respect of any lien held by him (*b*). After the receiving order and during the bankruptcy proceedings the statute ceases to run in respect of provable debts (*c*). The insertion of a debt in the statement of affairs is not sufficient to take it out of the statute (*d*), nor are the bankrupt's answers at an examination (*e*), nor is the payment of a dividend under another bankruptcy (*f*).

(*l*) *Saffery* v. *Mayer*, [1901] 1 K. B. 11.

(*m*) *Carney* v. *Plimmer*, [1897] 1 Q. B. 634.

(*n*) *O'Sullivan* v. *Thomas*, [1895] 1 Q. B. 698; *Burge* v. *Ashley & Smith, Ld.*, [1900] 1 Q. B. 744. See also *Shoolbred* v. *Roberts*, [1900] 2 Q. B. 497.

(*o*) *De Mattos* v. *Benjamin* (1894), 63 L. J. (Q. B.) 248.

(*p*) *Universal Stock Exchange* v. *Strachan*, [1896] A. C. 166; *Re Gieve*, [1899] 1 Q. B. 794. As to differences, see title STOCK EXCHANGE.

(*q*) *Re Cronmire, Ex parte Waud*, [1898] 2 Q. B. 383.

(*r*) *Re Cronmire, supra.* As to interest thereon, see *Re W. W. Duncan & Co.*, [1905] 1 Ch. 307.

(*s*) *Ex parte Rogers, Re Rogers* (1880), 15 Ch. D. 207. See also *Thacker* v. *Hardy* (1878), 4 Q. B. D. 685; *Forget* v. *Ostigney*, [1895] A. C. 318.

(*t*) *King* v. *Hutton*, [1900] 2 Q. B. 504.

(*a*) *Ex parte Dewdney, Ex parte Seaman* (1808), 15 Ves. 479; *Ex parte Roffey* (1815), 2 Rose, 245.

(*b*) *Re Hepburn, Ex parte Smith* (1884), 14 Q. B. D. 394, 400. See title LIMITATION OF ACTIONS.

(*c*) *Ex parte Ross, Re Coles* (1825), 2 Gl. & J. 46, and on appeal 330; *Ex parte Lancaster Banking Corporation, Re Westby* (1878), 10 Ch. D. 776, at p. 784; *Re Crosley* (1887), 35 Ch. D. 266. See also *Re Stock, Ex parte Amos* (1896), 3 Mans. 324, where after the termination, by reason of the debtor's default, of a composition which had extended over several years, the creditors were held remitted to their rights.

(*d*) *Everett* v. *Robertson* (1858), 28 L. J. (Q. B.) 23; *Ex parte Topping, Re Levey & Robson* (1865), 34 L. J. (BCY.) 44. See also *Ex parte Revell, Re Tollemache* (1884), 13 Q. B. D. 720; *Ex parte Edwards, Re Tollemache* (1884), 14 Q. B. D. 415.

(*e*) *Courtnay* v. *Williams* (1844), 13 L. J. (CH.) 461, and on appeal (1846) 15 L. J. (CH.) 204.

(*f*) *Taylor* v. *Hollard*, [1902] 1 K. B. 676. See also *Davies* v. *Edwards* (1851), 7 Exch. 22.

326. A plaintiff's costs in an action for unliquidated damages arising from tort are, like the damages, not provable, unless judgment has been entered before the receiving order (*g*). But it appears to be otherwise in the case of a provable debt (*h*).

Costs of plaintiff.

Where an action is brought by a person who afterwards becomes bankrupt and is unsuccessful, but neither verdict nor judgment for costs is given against him till after the receiving order, the defendant's costs are not provable (*i*). If, however, in such action there has been a verdict or judgment or order for costs before the receiving order, such costs, though not taxed and though judgment has not been entered, would be provable (*k*).

Costs of defendant.

Costs of arbitration.

On a reference by consent to arbitration the costs of the reference, though not awarded till after the receiving order, are provable (*l*).

Annuities.

327. An annuity is a contingent liability, the value of which may be estimated for proof. Thus an estimate may be made of the value of an annuity defeasible on a woman's marrying again (*m*), or defeasible on a resumption of cohabitation by husband and wife, or on dissolution of marriage by any act of either in the future, or on the wife leading an unchaste life (*n*).

Estimate of value.

In estimating the value all proper contingencies should be taken into account. Thus a valuation which did not take into account a clause in a separation deed between husband and wife making the annuity cease if cohabitation should be resumed and a covenant indemnifying the husband against the wife's debts would be incorrect (*o*). But a clause making an annuity cease on the resumption of cohabitation between two persons not husband and wife would be void, and could be disregarded in making the estimate (*p*).

Death of annuitant.

If the annuitant should die after the receipt of a dividend, and the dividend is greater than the amount which the bankrupt would have had to pay had he remained solvent, the proof or dividend cannot be disturbed (*q*).

(*g*) *Re Newman, Ex parte Brooke* (1876), 3 Ch. D. 494; *Re Bluck, Ex parte Bluck*, (1887), 57 L. T. 419; *Re British Gold Fields of West Africa*, [1899] 2 Ch. 7, from which it would seem that a verdict is sufficient, but this does not appear to be consistent with *Re Newman, supra*.

(*h*) *Emma Silver Mining Co.* v. *Grant* (1880), 17 Ch. D. 122; *Re British Gold Fields of West Africa, supra*.

(*i*) *Vint* v. *Hudspith* (1885), 30 Ch. D. 24; *Re Bluck, Ex parte Bluck, supra; Re British Gold Fields of West Africa, supra*.

(*k*) *Ex parte Peacock, Re Duffield* (1873), 8 Ch. App. 682; *Re British Gold Fields of West Africa, supra*. See, as to estimate of costs for voting purposes, *Ex parte Ruffle, Re Dummelow* (1873), 8 Ch. App. 997. In the case of a solicitor, delivery of a signed bill before proof is not necessary, but, on the other hand, the solicitor cannot insist on taxation (*Ex parte Ditton, Re Woods* (1880), 13 Ch. D. 318).

(*l*) *Re Smith, Ex parte Edwards* (1886), 3 Morr. 179. See also *Ex parte Harding, Re Pickering* (1854), 23 L. J. (BCY.) 22.

(*m*) *Ex parte Blakemore, Re Blakemore* (1877), 5 Ch. D. 372. As to annuities in general, see title RENT-CHARGES AND ANNUITIES.

(*n*) *Ex parte Neal, Re Batey* (1880), 14 Ch. D. 579.

(*o*) *Ex parte Pearce, Re Grieves* (1879), 13 Ch. D. 262, 265.

(*p*) *Ex parte Naden, Re Wood* (1874), 9 Ch. App. 670; and see *Re Abdy* [1895] 1 Ch. 455.

(*q*) *Ex parte Bates, Re Pannell* (1879), 11 Ch. D. 914. Compare *Re Miller*,

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Where the annuitant dies before the proof has been dealt with the value of the annuity will be taken to be the amount of the payments falling due up to the date of the death (*r*).

Guarantees.

328. A surety may be liable on his contract to pay a limited sum towards the ultimate balance remaining due after all moneys obtainable from other sources have been applied in reduction of the debt of the principal debtor, or he may be liable as surety for a part of the debt only (*s*). In the former case the creditor has the right to prove against the estate of the debtor for the whole of his debt till he has received twenty shillings in the pound notwithstanding that he has received some payment from the surety, and the surety has not by reason of that payment any right of proof in preference or priority to the creditor (*a*). If, however, in such a case the surety pays the whole debt, or if, being surety for a part of it only, he pays that part, then as regards the amount so paid he is subrogated to the rights of the creditor (*b*).

The creditor in proving is not entitled to regard a security obtained by the surety from the debtor (*c*).

Creditor's right of proof against surety.

329. A creditor may prove against the estate of a bankrupt surety, on his guarantee. But he must establish the liability of the surety, and, in the absence of agreement, this cannot be done by merely showing that the debtor has admitted the debt, or that judgment for it has been signed against him (*d*). The creditor must give credit for any amount which before proving he has realised, or for dividends which have been declared in the bankruptcy of the principal debtor, even if not actually received (*e*).

Proof may be allowed against the estate of a person who guarantees payment of interest on a company's debenture till the principal sum shall be repaid, though the company has gone into liquidation and has been dissolved (*f*), but no proof can be made by a surety

Ex parte Wardley (1877), 6 Ch. D. 790, where the bankrupt died before any dividend was paid.

(*r*) *Re Dodds, Ex parte Vaughan's Executors* (1890), 25 Q. B. D. 529. See also *Re Bridges* (1880), 17 Ch. D. 342; *Re Northern Counties of England Fire Insurance Co., MacFarlane's Claim* (1880), 17 Ch. D. 337; *Sovereign Life Assurance Co.* v. *Dodd*, [1892] 2 Q. B. 573.

(*s*) *Gray* v. *Seckham* (1872), 7 Ch. App. 680; *Hobson* v. *Bass* (1871), 6 Ch. App. 792; *Ellis* v. *Emmanuel* (1876), 1 Ex. D. 157; *Re Sass, Ex parte National Provincial Bank of England*, [1896] 2 Q. B. 12. See further, as to the liabilities of a surety, title GUARANTEE.

(*a*) *Re Sass, supra. Semble*, that would be so even where the contract of the surety does not expressly authorise the receipt of dividends by the creditor (*ibid.*).

(*b*) *Re Sass, supra.* If the creditor has received the dividend on the amount so paid by the surety he would hold it for the surety (*ibid.*).

(*c*) *Re Walker, Sheffield Banking Co.* v. *Clayton*, [1892] 1 Ch. 621; *Re Yewdall, Ex parte Braithwaite* (1877), 46 L. J. (BCY.) 87, and on appeal 109. See, as to surety's right to appropriate payments by him to such part of the creditor's debt as is provable, *Ex parte Sharp, Re Mason* (1844), 3 Mont. D. & De G. 490.

(*d*) *Ex parte Young, Re Kitchin* (1881), 17 Ch. D. 668.

(*e*) *Re Blakeley, Ex parte Aachener Disconto Gesellschaft* (1892), 9 Morr. 173. Compare *Ex parte Newton, Re Bunyard* (1880), 16 Ch. D. 330; *Ex parte Schofield, Re Firth* (1879), 12 Ch. D. 337, and *Re Blackburne, Ex parte Strouts* (1892), 9 Morr. 249.

(*f*) *Re Fitzgeorge, Ex parte Robson*, [1905] 1 K. B. 462.

for the cost of maintaining a security where the principal debt is extinguished (*g*).

Money deposited with the creditor by a co-surety, to be appropriated by the creditor when he thinks fit towards payment *pro tanto* of the debt, need not be deducted when the creditor proves against the surety's estate before such appropriation (*h*).

Surety's right of proof against principal debtor.

330. As to the surety's right of proof against the estate of the debtor, it is clear that he is at all events a creditor within the meaning of the fraudulent preference doctrine, for he has a contingent right of proof (*i*); but until he has paid the debt he is not entitled to prove for voting purposes at the first meeting of creditors (*k*), although for dividend purposes he can prove (*l*). Where a surety, party to a promissory note, pays the note at maturity, he is allowed to prove not only for the principal, but for interest from the date of payment to the date of the receiving order (*m*).

Surety's right against co-sureties.

So too a surety has a right of proof against a co-surety for a just proportion of the debt when he has paid the creditor's debt and taken an assignment of his securities (*n*); and though he has not paid the creditor, and his liability has not been ascertained, he will have a right to a declaration that when he shall have paid more than his due proportion the co-surety must contribute, and in respect of that right he will be entitled to prove against the estate of the co-surety (*o*).

Bills of exchange.

331. The bankruptcy rules relating to bills of exchange, promissory notes, and cheques apply notwithstanding anything in the Bills of Exchange Act, 1882 (*p*).

Holder may prove against several parties liable.

Under these rules a holder of a bill or note may proceed against the different parties liable until he has received twenty shillings in the pound on it. Thus if A. discounts bills drawn by one firm on another, and both firms become bankrupt, A., holding the bill,

(*g*) *Re Moss, Ex parte Hallet*, [1905] 2 K. B. 307.

(*h*) *Commercial Bank of Australia* v. *Official Assignee of the Estate of Wilson & Co.*, [1893] A. C. 181.

(*i*) *Re Paine, Ex parte Read*, [1897] 1 Q. B. 122. As to fraudulent preference, see Bankruptcy Act, 1883 (46 & 47 Vict. c. 52), s. 48, and pp. 279 *et seq.*, *post*.

(*k*) *Re Parrott, Ex parte Whittaker* (1891), 8 Morr. 49.

(*l*) Bankruptcy Act, 1883 (46 & 47 Vict. c. 52), s. 37; *Re Paine, supra; Re Herepath & Delmar, Ex parte Delmar* (1890), 7 Morr. 129, 190; *Wolmershausen* v. *Gullick*, [1893] 2 Ch. 514; *Re Blackpool Motor Car Co., Ltd.*, [1901] 1 Ch. 77. The difficulty is that there cannot be double proof in respect of the same debt (*Re Oriental Commercial Bank, Ex parte European Bank* (1871), 7 Ch. App. 99), so that, if the principal creditor has not been paid off and proves, the surety's proof would not be effective.

(*m*) *Re Evans, Ex parte Davies* (1897), 4 Mans. 114. Compare *Ex parte Bishop, Re Fox, Walker & Co.* (1880), 15 Ch. D. 400, at p. 415.

(*n*) *Ex parte Stokes* (1848), De G. 618; *Re Parker*, [1894] 3 Ch. 400. See also *Ex parte Snowdon, Re Snowdon* (1881), 17 Ch. D. 44.

(*o*) *Wolmershausen* v. *Gullick, supra*. The Statute of Limitations will not run against the surety till his liability has been ascertained (*ibid.*). As to the effect of a compromise with the trustee in bankruptcy of one of several co-sureties, see *Re Wolmershausen* (1890), 62 L. T. 541; and compare *Re E. W. A.*, [1901] 2 K. B. 642.

(*p*) 45 & 46 Vict. c. 61, s. 97. See title BILLS OF EXCHANGE ETC., p. 511, *post*.

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is entitled to prove against both estates, and to receive all dividends he can till he gets twenty shillings in the pound and interest, and that, too, whether the drawer is surety for the acceptor or *vice versâ*, for the surety cannot receive anything till the bill-holder is fully paid (*q*). But if before proof A. has received any payment from any party or any estate liable on the bill, or if any dividend has been declared (*r*), he must when proving give credit for the amount of such payment or dividend (*s*).

Debt secured by bills of larger amount.

332. Where bills have been given by the bankrupt to a creditor for a debt, and the creditor still holds them at the date of the receiving order, he can only prove for the actual amount of the debt remaining due, though the amount of the bills is greater (*t*); and the same is the case where the bills have been received by the creditor in pursuance of a guarantee given to him by the bankrupt as surety for a debtor (*a*). But where there is no immediate contract between the creditor and the surety, as in the case of the debtor handing to the creditor bills bearing the names of third parties as collateral security for a debt less than the amount of the bills, the creditor may prove in their bankruptcies for the full amount of the bills (*b*), though he cannot receive more than the actual amount due to him (*c*) and interest accrued whether before or after the receiving order (*d*).

Payment of part of debt proved.

333. A creditor with several separate debts cannot by means of his form of proof get more than twenty shillings in the pound and interest, if any, on each of them. Thus a creditor who has discounted for the bankrupt several bills drawn by the bankrupt must not prove for a bill that has been paid by the acceptor, though

(*q*) *Ex parte Turquand, Re Fothergill* (1876), 3 Ch. D. 445. See also *Ex parte Wildman* (1750), 1 Atk. 109; *Ex parte Marshall*, (1752) 1 Atk. 129; *Ex parte Rushforth* (1805), 10 Ves. 409, 416.

(*r*) *Ex parte Leers* (1802), 6 Ves. 644; *Ex parte Royal Bank of Scotland, Re Steen* (1815), 2 Rose, 197; *Ex parte Todd, Re Watson* (1815), 2 Rose, 202.

(*s*) *Cooper* v. *Pepys* (1741), 1 Atk. 106; *Ex parte Rushforth, supra*; *Ex parte Tayler, Re Houghton* (1857), 1 De G. & J. 302.

As to proof on promissory note payable on demand, see *Ex parte Beaufoy* (1787), Cooke's Bankrupt Laws, 8th ed. p. 180; or after notice or sight, though no notice or presentation given or made, *Ex parte Elgar, Re Mantle* (1823), 2 Gl. & J. 1; *Ex parte Downman* (1826), 2 Gl. & J. 85; *Ex parte Whitworth* (1841), 2 Mont. D. & De G. 158. See also *Clayton* v. *Gosling* (1826), 5 B. & C. 360; *Re Browne and Wingrove, Ex parte Ador*, [1891] 2 Ch. 574.

As to notice of dishonour in case of bankruptcy, see Bills of Exchange Act, 1882 (45 & 46 Vict. c. 61), s. 49 (10), and title BILLS OF EXCHANGE ETC., p. 545, *post*.

(*t*) *Ex parte Bloxham* (1801), 6 Ves. 449, 600; *Ex parte Reader, Re Willats* (1819), Buck, 381.

(*a*) *Ex parte Reader, Re Willats, supra*.

(*b*) *Ex parte Bloxham, supra*; *Ex parte Reader, Re Willats, supra*; *Ex parte De Tastet, Re Corson* (1810), 1 Rose, 10. It is immaterial that the bills were accepted for the accommodation of the debtor (*Ex parte Newton* (1880), 16 Ch. D. 330).

(*c*) *Ex parte De Tastet, supra*; *Ex parte Schofield, Re Firth* (1879), 12 Ch. D. 337.

(*d*) *Ex parte Martin, Re Fowler* (1814), 2 Rose, 87; *Ex parte Sammon* (1832), 1 Deac. & Ch. 564; *Ex parte Fairlie* (1833), 3 Deac. & Ch. 285; *Ex parte Reed* (1833), 3 Deac. & Ch. 481; *Re Joint Stock Discount Co.* (1869), 5 Ch. App. 86.

others remain unpaid, and a proof made before payment will after payment be expunged *pro tanto* (*e*). So where bills have been indorsed to the creditor by the bankrupt by way of collateral security, and any bill has been paid in full by another party, the creditor must deduct the amount of it from his proof or refund the proper amount from any dividend paid (*f*).

Proof by pledgee of bill.

If a bill handed by the bankrupt to his creditor, even though indorsed (*g*), was intended to be merely a deposit or pledge, the creditor before proof should, it appears, sell or value the bill (*h*). And so where a bill is deposited by the acceptor with A., and by him is pledged with B., the proof of B., who has not the general property in the bill, against the acceptor's estate in bankruptcy would depend on the state of the accounts between the acceptor and A. (*i*).

Purchase of bills of exchange.

334. Where a person *bonâ fide* purchases bills, to which the debtor is a party, for less than their face value, proof may be made for the whole amount (*j*). Proof is also allowed by a creditor who has made a fresh advance against bills given for that advance and a debt provable in a former bankruptcy (*k*). Discount need not be deducted in proving on a bill discounted (*l*).

Accommodation bills.

335. A man who puts his name on a bill for the accommodation of another stands in the position of a surety, and, if he takes up the bill, he may prove in the bankruptcy of the other (*m*). And where there is mutual accommodation paper and a bankruptcy of one party, the solvent party must before proof take up his own paper and so relieve the bankrupt's estate (*n*). If both parties become bankrupt,

(*e*) *Ex parte Barratt, Re Cowell* (1823), 1 Gl. & J. 327, followed in *Re Morris*, [1899] 1 Ch. 485, where a bank, holder of four bills, two of which were drawn by A. and accepted by B., and two drawn by C. and accepted by D., and all indorsed by the debtor, was not entitled to apply the surplus over twenty shillings in the pound received from various sources on the first two of the bills to meet a deficiency on the other two bills. This the bank had attempted to do by consolidating its debts and securities.

(*f*) *Ex parte Burn, Re Moulson* (1814), 2 Rose, 55; *Ex parte Brunskill* (1835), 4 Deac. & Ch. 442. See also *Ex parte Barratt, supra; Ex parte Hornby* (1844), De G. 69.

(*g*) The indorsement would *primâ facie* indicate that it was intended to pass the property in the bill with full remedies against all parties (*Ex parte Twogood* (1812), 19 Ves. 229).

(*h*) *Ex parte Baldwin* (1797), cited in *Ex parte Twogood, supra;* Bankruptcy Act, 1883 (46 & 47 Vict. c. 52), Sched. II., rules 9—11; and see *Ex parte Early, Re Early & Smith* (1866), 14 L. T. 296.

(*i*) *Ex parte Britten* (1833), 3 Deac. & Ch. 35; *Ex parte Phillips* (1840), 1 Mont. D. & De G. 232.

(*j*) *Ex parte Lee* (1721), 1 P. Wms. 781; *Re Gomersall* (1875), 1 Ch. D. 137, at p. 142. It is otherwise where the purchaser knows that the bills are shams intended to defeat creditors in bankruptcy (*Re Gomersall, supra*, affirmed *sub nom. Jones* v. *Gordon* (1877), 2 App. Cas. 616).

(*k*) *Re Aylmer, Ex parte Crane* (1893), 1 Mans. 391.

(*l*) *Ex parte Marlar* (1746), 1 Atk. 150.

(*m*) *Haigh* v. *Jackson* (1838), 3 M. & W. 598. See also p. 205, *ante*, and *Re Oriental Commercial Bank, Ex parte European Bank* (1871), 7 Ch. App. 99; *Ex parte Turquand, Re Fothergill* (1876), 3 Ch. D. 445.

(*n*) *Ex parte Bowness* (1789), cited in Cooke's Bankrupt Laws, 8th ed. p. 183; and see *Ex parte Read, Re Lynn* (1822), 1 Gl. & J. 224.

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there can be no proof on either side in respect of the accommodation paper, but, if there be a cash balance on either side, proof may be made for that (*o*). If, however, after satisfying the holders of the bills, the estate ultimately indebted in the accommodation transactions has any surplus, proof may be made against it in respect of such transactions (*p*).

Proof by *bonâ fide* holder.

336. Whether a bill be accepted for value or for the accommodation of the drawer, a *bonâ fide* holder for valuable consideration, to whom the bill has been transferred by the drawer as security for a debt less than the amount of the bill, may prove against the acceptor's estate for the whole amount of the bill and receive dividends till he has received the whole amount due (*q*).

If against a loan the bankrupt has accepted bills and given security, and the creditor discounts the bills, the security should be applied in taking up the bills so as to relieve the estate from proof by the holder (*r*).

Unindorsed bills.

337. Where there is an existing debt, and the creditor takes a bill for it without getting the indorsement of the debtor, the creditor, if the bill turns out to be worthless, may prove in the debtor's bankruptcy in respect of the debt; but if there is no such debt, and the bill is discounted without indorsement, this is a mere purchase of the bill, and there is no right of proof (*s*).

Foreign bills.

338. The drawer of a foreign bill of exchange accepted in England and dishonoured and protested may prove for damages in the nature of re-exchange against the acceptor's estate, whether he has paid these damages before the date of the receiving order (*t*), or remains liable to pay them (*u*).

Bill brokers.

339. Bill brokers, who discount bills for an acceptor and then rediscount them with their bankers, may prove in the acceptor's bankruptcy for the amount paid to the bankers, though they have

(*o*) *Ex parte Walker* (1798), 4 Ves. 373; *Ex parte Earle* (1801), 5 Ves. 833.

(*p*) *Ex parte Rawson* (1821), Jac. 274; *Ex parte Laforest, Ex parte Wetherell* (1833), 2 Deac. & Ch. 199. See also *Ex parte Metcalfe* (1805), 11 Ves. 404, where on a proof of cash balance dividends were retained. But where C. at the time of his bankruptcy owed P. a cash balance, but had given him bills in respect of part of it, which bills had been negotiated by P. and proof made on them against C.'s estate, the proof of the trustee of P.'s estate was confined to the difference between the cash balance and the acceptances given in respect of it, although P. had accepted bills for C. on a consideration which failed, and these had also been negotiated and proved against P.'s estate (*Ex parte Macredie, Re Charles* (1873), 8 Ch. App. 535). See also *Re London, Bombay, and Mediterranean Bank, Ex parte Cama* (1874), 9 Ch. App. 686.

(*q*) *Ex parte Newton, Re Bunyard* (1880), 16 Ch. D. 330.

(*r*) *Ex parte Mann, Re Kattengell* (1877), 5 Ch. D. 367. The creditor cannot so deal with his debt as to divide it into two debts, and by so doing evade the bankruptcy law as to security (*Baines* v. *Wright* (1885), 16 Q. B. D. 330).

(*s*) *Ex parte Blackburne* (1804), 10 Ves. 204, 206. See also *Ex parte Hustler, Re Goodchild* (1818), 3 Madd. 117.

(*t*) *Francis* v. *Rucker* (1768), Amb. 671; *Walker* v. *Hamilton* (1860), 1 De G. F. & J. 602; *Re General South American Co.* (1877), 7 Ch. D. 637.

(*u*) *Re Gillespie, Ex parte Robarts* (1886), 18 Q. B. D. 286; and see *Re Commercial Bank of South Australia* (1887), 36 Ch. D. 522.

not indorsed the bills, but are liable to the bankers by virtue of a general guarantee given to the bankers in respect of all bills discounted with them (*x*).

Calls on shares.

340. A company, or its liquidator in its name and on its behalf, may prove for calls, present or future, on shares, whether the proceedings be in bankruptcy or under an administration order (*a*).

Rent.

341. After disclaimer of a lease a lessor can prove for the difference between the rent reserved by the lease and that which it is estimated he can obtain in future (*b*), and an under-lessee, whose rent was less than that reserved by the original lease, for the difference between the two (*c*).

Proof against assignee of lease.

An assignor of a lease holding a covenant of indemnity from the assignee may, upon the bankruptcy of the assignee, prove for a portion of the rent till the premises can be relet, for the loss, if any, in the letting value, and for a sum in respect of dilapidations against which he has been indemnified (*d*).

Demised premises burned down.

Where premises are burned down and the tenant who is bound to reinstate them becomes bankrupt, proof may be allowed for the sum required to reinstate them, without making a deduction for an amount which the lessor has already received from an insurance company (*e*).

Counsel's fees.

342. A solicitor cannot pledge his client's credit to his counsel, and so counsel has no right of proof for his fees against the client's estate, even if the client has not paid them to the solicitor (*f*). If the solicitor has received the fees and becomes bankrupt, not having paid them, counsel would, it seems, be entitled to prove for them (*g*); and, if the fees are received by the trustee after bankruptcy, they should be paid to counsel (*g*). If the trustee receives a lump sum

(*x*) *Ex parte Bishop, Re Fox, Walker & Co.* (1880), 15 Ch. D. 400. See title BILLS OF EXCHANGE ETC., p. 504, note (*m*), *post*.

(*a*) *Re Mercantile Mutual Marine Insurance Association* (1883), 25 Ch. D. 415; *Re McMahon*, [1900] 1 Ch. 173. Where shares are disclaimed, proof may be allowed for the whole balance unpaid on them, deducting the value of anything accruing to the company by reason of the disclaimer (*Re Hallett, Ex parte National Insurance Corporation* (1894), 1 Mans. 380). See also *Re West Coast Gold Fields, Ltd., Rowe's Trustee's Claim*, [1906] 1 Ch. 1. Where, however, the bankrupt is only under contract to take up shares, and this contract is disclaimed, proof is allowed only in respect of damages for this breach of contract (*Re Hooley, Ex parte United Ordnance and Engineering Co.*, [1899] 2 Q. B. 579). As to proof in respect of non-delivery of goods, see and compare *Ex parte Llansamlet Tin Plate Co., Re Voss* (1873), L. R. 16 Eq. 155.

(*b*) *Ex parte Llynvi Coal and Iron Co., Re Hide* (1871), 7 Ch. App. 28; and see *Ex parte Waters, Re Hoyle* (1873), 8 Ch. App. 562. As to proof where tenant could determine lease at end of seventh year, and was liable for dilapidations, see *Ex parte Blake, Re McEwan* (1879), 11 Ch. D. 572; *Ex parte Tobit, Re Carruthers* (1895), 2 Mans. 172.

(*c*) *Ex parte Walton, Re Levy* (1881), 17 Ch. D. 746. See also *Hardy* v. *Fothergill* (1888), 13 App. Cas. 351.

(*d*) *Ex parte Tobit, Re Carruthers* (1895), 2 Mans. 172.

(*e*) *Re Blackburne, Ex parte Strouts* (1892), 9 Morr. 249. Compare *Re Blakeley, Ex parte Aachener Disconto Gesellschaft* (1892), 9 Morr. 173.

(*f*) *Mostyn* v. *Mostyn* (1870), 5 Ch. App. 457. See title BARRISTERS, pp. 392, 393, *post*.

(*g*) *Re H. & C. Hall* (1856), 2 Jur. (N. S.) 1076.

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from the client in settlement of the solicitor's whole bill of costs, a proportionate amount of it should be paid to counsel for his fees (*h*).

Foreign creditors.

343. Ordinarily a foreign creditor has a right of proof, but if in proceedings for the administration of the bankrupt's property abroad he has received any sum which would be divisible amongst the bankrupt's creditors generally, that sum must be brought into account before he can be allowed to prove here (*i*).

Executors.

344. Generally speaking, one of several executors may prove on behalf of himself and the others (*k*). If an executor refuses to make a proof a residuary legatee or other person interested may get leave to prove (*l*).

Where a sole executor becomes bankrupt it would seem that he cannot prove against himself without an order of the court (*m*). In such a case a legatee may apply for leave to prove (*n*).

Trustees.

345. All trustees should if possible join in a proof (*o*), and so also should *cestuis que trust* who are *sui juris* (*p*).

Where there are two trustees who have committed a breach of trust, and one becomes bankrupt, proof for the full amount of the trust moneys lost may be made against the bankrupt's estate, even though a sum by way of compromise has been received from the other trustee (*q*).

(*h*) *Ex parte Colquhoun, Re Clift* (1890), 38 W. R. 688. It is not clear that the trustee could agree to accept a lump sum from the client, excluding counsel's fees.

(*i*) *Selkrig* v. *Davis* (1814), 2 Rose, 291; *Ex parte Wilson, Re Douglas* (1872), 7 Ch. App. 490; *Banco de Portugal* v. *Waddell* (1880), 5 App. Cas. 161. But this only applies to what he has obtained by process abroad. If, apart from such process, he is by foreign law a secured creditor, he may value his security and prove for the balance of his debt (*Re Somes, Ex parte De Lemos* (1896), 3 Mans. 131). As to proof on a contract made abroad when the remedy is there barred by non-registration, see note (*m*), p. 200, *ante*.

(*k*) *Ex parte Smith, Re Manning* (1836), 1 Deac. 385; *Ex parte Phillips, Re Wright* (1837), 2 Deac. 334. See *Ex parte Courtenay, Re Davis* (1835), 2 Mont. & A. 227 (where one of two executors became bankrupt).

(*l*) *Ex parte Caldwell, Re Strahan, Paul and Bates* (1865), 13 W. R. 952.

(*m*) *Ex parte Shaw, Re Howard and Gibbs* (1822), 1 Gl. & J. 127; *Ex parte Colman, Re Colman* (1833), 2 Deac. & Ch. 584.

(*n*) *Ex parte Moody, Re Warne* (1816), 2 Rose, 413; *Ex parte Beilby, Re Boyes* (1821), 1 Gl. & J. 167. Proof may be made in respect of a legacy against an executor who has received assets (*Walcott* v. *Hall* (1788), 2 Bro. Ch. Rep. 305; *Ex parte Moody, Re Warne* (1816), 2 Rose, 413).

(*o*) *Ex parte Smith, Re Manning* (1836), 2 Mont. & A. 536; *Ex parte Phillips, Re Wright* (1837), 2 Deac. 334.

(*p*) *Ex parte Dubois* (1787), 1 Cox, Eq. Cas. 310; *Ex parte Gray* (1835), 4 Deac. & Ch. 778; *Ex parte Adams, Re Culley* (1878), 9 Ch. D. 307 (petitioning creditor). Possibly the same strictness would not be observed now in the case of a mere proof as where the proof is in respect of the petitioning creditor's debt. See also *Ex parte Green* (1832), 2 Deac. & Ch. 113, 116, where a trustee proved against the bankrupt in respect of a breach of trust by himself.

(*q*) *Edwards* v. *Hood-Barrs*, [1905] 1 Ch. 20. See *Re Lake, Ex parte Howe Trustees*, [1903] 1 K. B. 439, where the right of proof of *cestuis que trust* was affected by compromise of an action without the leave of the trustee in bankruptcy of their trustee. See also, as to remedies against trustees, *Re Ridgway, Ex parte Mein* (1886), 3 Morr. 212; *Smith* v. *Patrick*, [1901] A. C. 282, 295. See title TRUSTS AND TRUSTEES.

SUB-SECT. 1. Debts Provable in Bankruptcy.

346. A release given to a debtor in a deed of arrangement which is afterwards superseded by a bankruptcy will not prevent proof in the bankruptcy unless it is clear that it was intended that it should do so (*r*). — Releases.

Where goods bailed to a person who becomes bankrupt are lost to the true owner by virtue of the doctrine of reputed ownership the true owner has a right of proof for the loss sustained by the non-delivery of the goods to him (*s*). — Owner of goods in reputed ownership of bankrupt.

A creditor who has accounted to the trustee for money or goods received from the bankrupt by way of fraudulent preference may prove for his debt with the other creditors (*t*). — Creditors fraudulently preferred.

Where on the true construction of a contract a sum named to be paid for breach of contract is to be regarded as a penalty, proof will be allowed only for the actual damage sustained (*u*). — Penalties.

Proof may be made on an implied promise to indemnify (*a*). — Indemnities.

In the absence of novation, a mortgagee cannot prove against the estate of the assignee of the equity of redemption for arrears of interest, even though the latter has paid some interest (*b*). — Assignee of equity of redemption.

Commission for finding a purchaser is provable though the actual sale is not carried out till after bankruptcy (*c*). — Commissions.

Where a money-lender does not prove, the power of the court to reopen a harsh and unconscionable transaction (*d*) does not arise (*e*). — Money-lenders.

SUB-SECT. 2.—*Set-off.*

347. Where there have been mutual credits, mutual debts, or other mutual dealings between a debtor against whom a receiving order has been made and another person who proves or claims to prove a debt under the receiving order, or who is sued by the trustee in respect of a debt due to the estate (*f*), then, provided that the claims on each side are such as result in pecuniary liabilities arising out of contract (*g*), an account is taken of what is — Definition of mutual credits.

(*r*) *Re Stephenson, Ex parte Official Receiver* (1888), 20 Q. B. D. 540, and see *Re Clement, Ex parte Goas* (1886), 3 Morr. 153; *Re Stock, Ex parte Amos* (1896), 3 Mans. 324.

(*s*) *Re Button, Ex parte Haviside*, [1907] 2 K. B. 180.

(*t*) *Re Stephenson, supra.* As to proof under bankrupt's marriage settlement, see *Ex parte Bishop, Re Tönnies* (1873), 8 Ch. App. 718; *Re Knight, Ex parte Cooper* (1885), 2 Morr. 223.

(*u*) *Re Newman, Ex parte Capper* (1876), 4 Ch. D. 724. See observations on that case in *Wallis* v. *Smith* (1882), 21 Ch. D. 243, and on this latter case in *Willson* v. *Love*, [1896] 1 Q. B. 626, and title DAMAGES.

(*a*) *Ex parte Ford, Re Chappell* (1885), 16 Q. B. D. 305 (mortgagee postponing his security at request of mortgagor).

(*b*) *Re Errington, Ex parte Mason*, [1894] 1 Q. B. 11.

(*c*) *Re Beale, Ex parte Durrant* (1888), 5 Morr. 37.

(*d*) Money-lenders Act, 1900 (63 & 64 Vict. c. 51), s. 1 (1), (3). See title MONEY AND MONEY-LENDING.

(*e*) *Re Attree, Ex parte Ward*, [1907] 2 K. B. 868. It would appear that this case only deals with the right of proof, and does not affect the general power of the court to go behind a judgment obtained by a money-lender. See *Re a Debtor, Ex parte the Debtor*, [1903] 1 K. B. 705, and p. 57, *ante*.

(*f*) See *Peat* v. *Jones* (1881), 8 Q. B. D. 147; *Jack* v. *Kipping* (1882), 9 Q. B. D. 113.

(*g*) See cases cited in note (*f*), *supra*; *Naoroji* v. *Chartered Bank of India* (1868), L. R. 3 C. P. 444; *Palmer* v. *Day & Sons*, [1895] 2 Q. B. 618.

SUB-SECT. 2. Set-off.

due from each party to the other in respect of such mutual dealings, and, the respective sums being set off one against the other, the balance only can be claimed.

Where right of set-off is available.

348. The benefit of set-off is not allowed to any person who at the time he gave credit to the debtor had notice of an available act of bankruptcy committed by him (*h*). But if on a contract entered into without such notice there is a liability of the bankrupt at the date of the receiving order, which is the dividing line (*i*), it is immaterial that the actual amount of the debt is not ascertained until afterwards (*j*).

Where one claim is not a certain present debt.

A right of set-off may exist not only where two debts are due, but also where one debt will not become due till a future date, and where the claim on one side is for unliquidated damages arising out of contract (*k*). But there is no right of set-off where the claim on one side is for a return of goods in specie (*l*), or in respect of moneys or goods deposited for a specific purpose which has not been carried out (*m*), or of a balance of such moneys remaining when it has been carried out (*n*), or where the right has been excluded by agreement (*o*). Such right, however, exists where there is a debt on one side and a delivery of property with directions to turn it into money on the other (*p*).

Secured debts.

349. A right of set-off may exist though one of the debts is secured (*q*), and though the parties did not originally intend to have mutual dealings, as where a person has received before the date of the receiving order, and without notice of an available act of

(*h*) Bankruptcy Act, 1883 (46 & 47 Vict. c. 52), s. 38. As to notice of an available act of bankruptcy, see p. 290, *post*.

(*i*) *Re Daintrey, Ex parte Mant*, [1900] 1 Q. B. 546; *Trustee in Bankruptcy of Lord* v. *Great Eastern Rail. Co.* (1907), 24 T. L. R. 83. Compare *Elliott* v. *Turquand* (1881), 7 App. Cas. 79 (Bankruptcy Act, 1869 (32 & 33 Vict. c. 71)); *Re Gillespie, Ex parte Reid* (1885), 14 Q. B. D. 963. See notes (*t*)—(*c*), p. 213, *post*.

(*j*) *Re Daintrey, supra; Re Rushforth, Ex parte Holmes* (1907), 95 L. T. 807; *Sovereign Life Assurance Co.* v. *Dodd*, [1892] 1 Q. B. 405, on appeal [1892] 2 Q. B. 573. There may be a difficulty in reconciling with these cases *Ex parte Price, Re Lankester* (1875), 10 Ch. App. 648, where a policy-holder borrowed money from the insurance company, which then went into liquidation, a value being put on the policy for the purposes of the liquidation. The policy-holder became bankrupt, and it was held that the above value was not a debt which could be set off against the debt due to the company. See also *Lee and Chapman's Case* (1885), 30 Ch. D. 216; *Elgood* v. *Harris*, [1896] 2 Q. B. 491.

(*k*) See *Ex parte Prescott* (1753), 1 Atk. 230; *Booth* v. *Hutchinson* (1872), L. R. 15 Eq. 30; *Peat* v. *Jones* (1881), 8 Q. B. D. 147; *Jack* v. *Kipping* (1882), 9 Q. B. D. 113; *Re Daintrey, supra*. As to unliquidated damages arising out of contract, see p. 198, *ante*.

(*l*) *Ex parte Flint* (1818), 1 Swan. 30; *Key* v. *Flint* (1817), 8 Taunt. 21; *Rose* v. *Hart* (1818), 8 Taunt. 499; *Re Winter, Ex parte Bolland* (1878), 8 Ch. D. 225; *Eberle's Hotels and Restaurant Co.* v. *Jonas* (1887), 18 Q. B. D. 459; *Trustee in Bankruptcy of Lord* v. *Great Eastern Rail. Co.* (1907), 24 T. L. R. 83.

(*m*) *Buchanan* v. *Findlay* (1829), 9 B. & C. 738; *Re Pollitt, Ex parte Minor*, [1893] 1 Q. B. 455.

(*n*) *Re Mid-Kent Fruit Factory*, [1896] 1 Ch. 567.

(*o*) *Clarke* v. *Fell* (1833), 4 B. & Ad. 404; *Ex parte Fletcher, Re Vaughan* (1877), 6 Ch. D. 350; *Watkins* v. *Lindsay & Co.* (1898), 5 Mans. 25, 29.

(*p*) *Naoroji* v. *Chartered Bank of India* (1868), L. R. 3 C. P. 444; *Astley* v. *Gurney* (1869), L. R. 4 C. P. 714; *Palmer* v. *Day & Sons*, [1895] 2 Q. B. 618.

(*q*) *Ex parte Barnett, Re Deveze* (1874), 9 Ch. App. 293; and see *McKinnon* v. *Armstrong* (1877), 2 App. Cas. 531.

SUB-SECT. 2. Set-off.

bankruptcy, a bill on which the bankrupt is liable (*r*); and, it would seem, though proof of a debt is postponed by law (*s*).

Rights generally determined at date of receiving order.

Generally a right of set-off not existing at the date of the receiving order cannot be acquired afterwards (*t*). But a surety before the receiving order who after it pays off the debt and gets from the principal creditor his securities, including a bill on which the bankrupt is liable, may set off the amount of it against a debt due by himself to the estate (*a*); and so, it seems, may a person who since the date of the receiving order has been compelled to take up an acceptance of the bankrupt (*b*). Attempts to evade set-off by an assignment after the receiving order will be frustrated (*c*).

Cases where set-off allowed.

350. Set-off will be ordered between a debt due to one party and the amount of acceptances given to him by the other which are outstanding in the hands of third parties (*d*).

Factors.

There may be a set-off between factors and those who deal with them without any knowledge of principals (*e*).

Contributory of company.

If a contributory of a company is bankrupt, debts due to him or to an assignee from him before bankruptcy (*f*) may be set off against calls (*g*); but not if he remains solvent (*h*).

Executor legatee.

A residuary legatee may claim a set-off against the amount misappropriated by him as executor (*i*).

Administration of deceased's estate.

Set-off may be raised where a deceased's estate is being administered in bankruptcy (*k*).

No set-off where debt assigned.

351. The provision as to mutual credit applies only as between the bankrupt and a creditor (*l*), and therefore does not apply where

(*r*) *Alsager* v. *Currie* (1844), 12 M. & W. 751. See also *Hankey* v. *Smith* (1789), 3 Term Rep. 507; *Collins* v. *Jones* (1830), 10 B. & C. 777.

(*s*) *Ex parte Sheil, Re Lonergan* (1877), 4 Ch. D. 789.

(*t*) *Dickson* v. *Evans* (1794), 6 Term Rep. 57; *Re Milan Tramways Co., Ex parte Theys* (1884), 25 Ch. D. 587.

(*a*) *Ex parte Barrett, Re Moseley Green Coal Co.* (1865), 13 W. R. 559.

(*b*) Compare *Bolland* v. *Nash* (1828), 8 B. & C. 105; *Collins* v. *Jones* (1830), 10 B. & C. 777; *McKinnon* v. *Armstrong* (1877), 2 App. Cas. 531.

(*c*) *Edmeads* v. *Newman* (1823), 1 B. & C. 418.

(*d*) *Ex parte Macredie, Re Charles* (1873), 8 Ch. App. 535; *Re London, Bombay and Mediterranean Bank, Ex parte Cama* (1874), 9 Ch. App. 686. As to cross-accommodation acceptances where both parties are bankrupt, see *Ex parte Walker* (1798), 4 Ves. 373; *Ex parte Laforest, Ex parte Wetherell* (1833), 2 Deac. & Ch. 199; *Ex parte Rawson* (1821), Jac. 274; and compare paragraph 335, *ante*.

(*e*) *Ex parte Dixon, Re Henley* (1876), 4 Ch. D. 133. Compare *Cooke* v. *Eshelby* (1887), 12 App. Cas. 271; *Montagu* v. *Forwood*, [1893] 2 Q. B. 350.

(*f*) *Re Universal Banking Corporation, Ex parte Strang* (1870), 5 Ch. App. 492.

(*g*) *Re Duckworth* (1867), 2 Ch. App. 578; *Re Anglo-Greek Steam Navigation and Trading Co., Carralli & Haggard's Claim* (1869), 4 Ch. App. 174. Compare *Re G. E. B.*, [1903] 2 K. B. 340 (no set-off on service of bankruptcy notice).

(*h*) *Grissell's Case* (1866), 1 Ch. App. 528; *Re Hiram Maxim Lamp Co.*, [1903] 1 Ch. 70, and cases there cited.

(*i*) *Re Chapman, Ex parte Parker* (1887), 4 Morr. 109. See also *Ex parte Turner, Re Crosthwaite* (1852), 2 De G. M. & G. 927. Compare *Ex parte Stone, Re Welch* (1873), 8 Ch. App. 914.

(*k*) *Watkins* v. *Lindsay & Co.* (1898), 5 Mans. 25. See note (*i*), p. 96, *ante*.

(*l*) *Turner* v. *Thomas* (1871), L. R. 6 C. P. 610. Equitable rights are recognised in set-off (*Forster* v. *Wilson* (1843), 12 M. & W. 191; *Middleton* v. *Pollock, Ex parte Nugee* (1875), L. R. 20 Eq. 29; *Bailey* v. *Finch* (1871), L. R. 7 Q. B. 34; *Bailey* v. *Johnson* (1872), L. R. 7 Exch. 263; *Bankes* v. *Jarvis*, [1903] 1 K. B. 549).

SUB-SECT. 2. Set-off.

the debt due to the bankrupt has been assigned by him before the receiving order (*m*).

Joint and separate debts.

In the absence of agreement, express or implied (*n*), there is no set-off between joint and separate debts (*o*); but if one joint debtor is a surety for the other the principal debtor may set off against the joint debt a debt due to himself (*p*); and a person induced to become surety by the creditor's fraud may set off a claim of his in respect of the fraud against the debt due by the principal debtor (*q*).

Debts due in different rights.

352. In order that debts may be set off, they must be due respectively in the same right (*r*), and therefore debts due to or from executors cannot be set off against debts due from or to their testators (*s*), nor debts due to or from a trustee in bankruptcy against debts due from or to the bankrupt (*t*). And where a creditor has since the bankruptcy received money which on such receipt belongs in equity to the trustee in bankruptcy he cannot set off against it a debt due to him by the bankrupt (*u*).

Costs.

Costs in bankruptcy proceedings cannot be set off against costs in other proceedings, though the two proceedings are between the same parties (*a*).

Legatees.

353. The case of a legatee indebted to the testator's estate is not strictly a case of set-off, for there are not mutual debts (*b*), but by analogy an executor may retain a share of the testator's assets, unless funds have been specifically appropriated to meet the legacy (*c*), against a debt due by the legatee (*d*), or against the costs

(*m*) *De Mattos* v. *Saunders* (1872), L. R. 7 C. P. 570; *Lee and Chapman's Case* (1885), 30 Ch. D. 216.

(*n*) *Kinnerley* v. *Hossack* (1809), 2 Taunt. 170; *Tyso* v. *Pettit* (1879), 40 L. T. 132.

(*o*) *Ex parte Twogood* (1805), 11 Ves. 517; *New Quebrada Co.* v. *Carr* (1869), L. R. 4 C. P. 651. Compare *Slipper* v. *Stidstone* (1794), 5 Term Rep. 493; *French* v. *Andrade* (1796), 6 Term Rep. 582 (surviving partner).

(*p*) *Ex parte Hanson* (1806), 12 Ves. 346; S. C. (1811), 18 Ves. 232.

(*q*) *Ex parte Stephens* (1805), 11 Ves. 24; and see *Ex parte Hanson*, *supra*, at p. 348. See also *Vulliamy* v. *Noble* (1817), 3 Mer. 593, 618.

(*r*) *Lister* v. *Hooson*, [1908] 1 K. B. 174.

(*s*) *Bishop* v. *Church* (1748), 3 Atk. 691. See also *Ex parte Morier*, *Re Willis Percival & Co.* (1879), 12 Ch. D. 491; and compare *Bailey* v. *Finch* (1871), L. R. 7 Q. B. 34.

(*t*) *Lister* v. *Hooson*, *supra*; *Ex parte Whitehead*, *Re Hirk* (1821), 1 Gl. & J. 39; *West* v. *Pryce* (1825), 2 Bing. 455; *Groom* v. *Mealey* (1835), 2 Bing. (N. C.) 138; *Alloway* v. *Steere* (1882), 10 Q. B. D. 22 (rent due before bankruptcy, and value of tillages payable to trustee who carries on farm). Compare *Re Wilson*, *Ex parte Lord Hastings* (1893), 10 Morr. 219 (custom of the country). See also *Ex parte Sir W. Hart Dyke*, *Re Morrish* (1882), 22 Ch. D. 410; *Lybbe* v. *Hart* (1885), 29 Ch. D. 8.

(*u*) *Elgood* v. *Harris*, [1896] 2 Q. B. 491 (salvage received by insurance broker in respect of a loss paid by bankrupt underwriter).

(*a*) *Re Bassett*, *Ex parte Lewis*, [1896] 1 Q. B. 219; *Ex parte Griffin*, *Re Adams* (1880), 14 Ch. D. 37. As to solicitor's lien, see *Ex parte Cleland*, *Re Davies* (1867), 2 Ch. App. 808.

(*b*) *Courtenay* v. *Williams* (1846), 15 L. J. (CH.) 204, affirming S. C. (1844), 3 Hare, 539; *Re Akerman*, [1891] 3 Ch. 212. See title EXECUTORS AND ADMINISTRATORS.

(*c*) *Ballard* v. *Marsden* (1880), 14 Ch. D. 374.

(*d*) *Courtenay* v. *Williams*, *supra*.

of an unsuccessful probate action brought against him (*e*). Administrators have similar rights (*f*). This right of retainer does not, however, exist in the case of a specific legacy (*g*). But it may exist though the remedy for the debt is barred by the Statute of Limitations (*h*). In cases of this class, where the legatee becomes bankrupt after the testator's death owing money to the estate, the trustee in bankruptcy is in no better position than the legatee (*i*). If, however, the bankruptcy of the legatee takes place before the testator's death, then, as the debt may be gone by an order of discharge or otherwise, there may be no right to retain (*k*).

SUB-SECT. 2. Set-off.

If the executor has no right of proof, he has, it would seem, no right of retainer (*l*); but if he does prove, the right of retainer is lost (*m*).

An executor's right to retain out of the assets the amount of his own debt is not affected by the Bankruptcy Acts (*n*).

Executor's right of retainer.

SUB-SECT. 3.—*Priority of Debts.*

354. By various statutes certain debts have in bankruptcy proceedings priority over others. Thus in the bankruptcy of an officer of a friendly society who has in his possession by virtue of his office money or property of the society, the trustees of the society have a right to receive such money or property in preference to any other debt or claim against the estate of the officer (*o*). If the officer has received the money or property by virtue of his office, it is immaterial that it cannot be traced (*p*), or that he

Friendly societies.

(*e*) *Taylor* v. *Taylor* (1875), L. R. 20 Eq. 155; *Re Knapman* (1880), 18 Ch. D. 300; *Re Jones*, [1897] 2 Ch. 190.

(*f*) *Re Cordwell* (1875), L. R. 20 Eq. 644. See also as to trustees, *Re Akerman*, [1891] 3 Ch. 212; *Re Weston*, [1900] 2 Ch. 164, and the cases there cited; *Re Hope*, [1900] W. N. 76.

(*g*) *Re Akerman*, *supra*, per KEKEWICH, J., at p. 218. See *Re Richardson*, *Ex parte Thompson and Hutton* (1902), 86 L. T. 25, as to what is not a specific legacy; and see generally title WILLS.

(*h*) *Courtenay* v. *Williams* (1846), 15 L. J. (CH.) 204, affirming S. C. (1844), 3 Hare, 539; *Re Cordwell*, *supra*; *Hankinson* v. *Hayter*, *Re Wheeler*, [1904] 2 Ch. 66.

(*i*) *Bousfield* v. *Lawford* (1863), 1 De G. J. & Sm. 459; *Re Batchelor* (1873), L. R. 16 Eq. 481; *Re Watson*, [1896] 1 Ch. 925 (where the right of retainer was exercised by the executors of the testator, who was surety for the bankrupt).

(*k*) Compare *Cherry* v. *Boultbee* (1839), 4 My. & Cr. 442; *Re Hodgson* (1878), 9 Ch. D. 673; *Re Orpen* (1880), 16 Ch. D. 202 (amount of composition substituted for debt); *Re Rees* (1889), 60 L. T. 260 (no enforceable debt at date of death).

(*l*) *Re Binns*, [1896] 2 Ch. 584.

(*m*) *Armstrong* v. *Armstrong* (1871), L. R. 12 Eq. 614; *Stammers* v. *Elliott* (1868), 3 Ch. App. 195; *Re Watson*, *supra*. Compare *Ex parte Dicken*, *Re Dicken* (1817), Buck, 115, which, however, was not a case of an executor, who has absolute power over the debts due to his testator, but of a trustee, who cannot deprive a *cestui que trust* of his lien.

(*n*) *Re Williams*, *Ex parte Lewis and Evans* (1891), 8 Morr. 65; *Re Gilbert*, *Ex parte Gilbert*, [1898] 1 Q. B. 282; *Re Rhoades*, *Ex parte Rhoades*, [1899] 2 Q. B. 347.

(*o*) Friendly Societies Act, 1896 (59 & 60 Vict. c. 25), s. 35, replacing Friendly Societies Act, 1875 (38 & 39 Vict. c. 60). Bankruptcy in this section includes "liquidation of a debtor's affairs by arrangement" (*ibid.*), which may, though not very aptly, apply to compositions and schemes of arrangement under the Bankruptcy Act, 1883 (46 & 47 Vict. c. 52), s. 23, and the Bankruptcy Act, 1890 (53 & 54 Vict. c. 71), s. 3. Possibly the above section would not give priority over Crown debts.

(*p*) *Re Miller*, *Ex parte Official Receiver*, [1893] 1 Q. B. 327.

SUB-SECT. 3. Priority of Debts.

wrongfully omitted to pay it over after receipt (*q*), or that there was a want of due diligence on the part of the society (*r*).

For the purposes just mentioned an officer of a friendly society includes any trustee, treasurer, secretary, or member of the committee of management of a society or branch, or any person appointed by the society or branch to sue and be sued on its behalf (*s*).

Savings banks.

355. If an officer in a savings bank intrusted with the keeping of the accounts or having in his hands or possession, by virtue of his office or employment, money or effects belonging to the bank, or any deeds or securities relating to the same, becomes bankrupt or insolvent, his trustee must within forty days after demand pay and deliver to the trustees of the bank all assets belonging to it, and pay out of the estate before all other debts all moneys remaining due which such officer may have received by virtue of his office or employment (*a*).

Stannaries.

356. Miners employed in the stannaries of Devon and Cornwall have a first charge on the assets of the mine in respect of their wages for a period not exceeding three months (*b*).

Employer's liability insurance.

357. Where an employer who has insured his workmen against accidents becomes bankrupt or makes a composition or arrangement with his creditors, the rights of the employer in respect of the insurance pass to the workmen (*c*).

(*q*) *Re Welch, Ex parte Trustees of Star Society of Oddfellows* (1894), 1 Mans. 62.

(*r*) *Moors* v. *Marriott* (1878), 7 Ch. D. 543. Compare *Re Welch, supra*. See also *Ex parte Burge, Re Baker* (1841), 1 Mont. D. & De G. 540; *Absolum* v. *Gething* (1863), 32 L. J. (CH.) 786. The above section of the Friendly Societies Act, 1896 (59 & 60 Vict. c. 25), is not affected by the Preferential Payments in Bankruptcy Act, 1888 (51 & 52 Vict. c. 62). See s. 2 of the last-named Act.

(*s*) Friendly Societies Act, 1896 (59 & 60 Vict. c. 25), s. 106. As to who is an officer, see *Ex parte Appach* (1840), 1 Mont. D. & De G. 83; *Ex parte Riddell* (1842), 3 Mont. D. & De G. 80; *Re Whipham* (1844), 3 Mont. D. & De G. 564; *Ex parte Orford* (1852), 1 De G. M. & G. 483. He must have got the money or property by virtue of his office (*Re Aberdein, Hazon* v. *Aberdein*, [1896] W. N. 154), and see *Ex parte Buckland, Re Thick* (1818), Buck, 214; *Ex parte Fleet, Re Jardine* (1850), 4 De G. & Sm. 52 (savings banks). To determine if he has, the section is construed strictly (*Ex parte Ross* (1802), 6 Ves. 802; *Re West of England and South Wales District Bank, Ex parte Swansea Friendly Society* (1879), 11 Ch. D. 768, where it was held that an incorporated company cannot be an officer). If the transaction amounted in substance to a loan to the bankrupt there will be no priority (*Ex parte Amicable Society of Lancaster* (1801), 6 Ves. 98; *Ex parte Ross, supra; Ex parte Stamford Friendly Society* (1808), 15 Ves. 280; *Ex parte Long Ashton Junior Friendly Society, Re Shattock* (1861), 5 L. T. 370), though an agreement to pay interest on moneys to come into an officer's hands may not defeat a claim to priority (*Ex parte Ray, Re Woodliffe* (1839), 3 Deac. 537).

(*a*) Savings Banks Act, 1891 (54 & 55 Vict. c. 21), s. 13, which retains the priority given by s. 14 of the Trustee Savings Bank Act, 1863 (26 & 27 Vict. c. 87), notwithstanding s. 40 of the Bankruptcy Act, 1883 (46 & 47 Vict. c. 52) —now replaced in part by Preferential Payments in Bankruptcy Act, 1888 (51 & 52 Vict. c. 62)—which is not to affect such priority.

(*b*) Stannaries Act, 1887 (50 & 51 Vict. c. 43), s. 4. This Act is not affected by the Preferential Payments in Bankruptcy Act, 1888 (51 & 52 Vict. c. 62). See s. 2 (2) of the latter Act.

(*c*) Workmen's Compensation Act, 1906 (6 Edw. 7, c. 58), s. 5. If there is no insurance a workman may have, in respect of compensation accrued before the

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358. In the administration of the estate of a deceased debtor under an order of administration the claim of the legal personal representative to payment of the proper funeral and testamentary expenses incurred by him in and about the debtor's estate is deemed a preferential debt under the order, and payable in full out of the estate in priority to all other debts (*d*).

Funeral and testamentary expenses.

359. Apart from the above-mentioned debts and claims so specifically preferred, there are certain other debts which both in ordinary bankruptcies and in the administration of the estates of deceased insolvents must be paid *pari passu* in full in priority to the other debts of the bankrupt, unless the assets are insufficient, in which case they are to abate in equal proportions amongst themselves (*e*).

Preferred debts.

These preferred debts are as follows: (1) all parochial or other local rates due from the bankrupt at the date of the receiving order (*f*), and having become due and payable within twelve months next before that time, and all assessed taxes, land tax, and income tax assessed on the bankrupt up to April 5 preceding the receiving order and not exceeding in the whole one year's assessment (*g*); (2) all wages or salary (*h*) of any clerk or servant in respect of services rendered to the bankrupt during four months before the date of the receiving order (*i*) not exceeding £50 (*k*);

Rates and taxes.

Salaries.

date of the receiving order, a preferential debt within the Preferential Payments in Bankruptcy Act, 1888 (51 & 52 Vict. c. 62), s. 1, to an amount not exceeding £100 (*ibid.*, s. 5 (3)).

(*d*) Bankruptcy Act, 1883 (46 & 47 Vict. c. 52), s. 125 (7).

(*e*) Preferential Payments in Bankruptcy Act, 1888 (51 & 52 Vict. c. 62), s. 1 (1), (2), which replaced Bankruptcy Act, 1883 (46 & 47 Vict. c. 52), s. 40 (1) (2). The preferred debts are to be paid forthwith subject to the retention of such sums as may be necessary for the costs of administration or otherwise (s. 1 (3)). In the case of a deceased insolvent the date of the death corresponds to the date of a receiving order (s. 1 (6)). It should be mentioned that this Act does not affect secured creditors in bankruptcy (*Richards* v. *Overseers of Kidderminster*, [1896] 2 Ch. 212); but it now affects in the winding-up of a company the holders of debentures or debenture stock under a floating charge; see Preferential Payments in Bankruptcy Amendment Act, 1897 (60 & 61 Vict. c. 19), and title COMPANIES.

(*f*) Or date of death, as the case may be (s. 1 (6)). Where a half-year's rate was payable in advance, and the bankrupt remained in occupation after the receiving order to the end of the half-year, the whole of the rate was payable in full (*Re Thomas, Ex parte Ystradyfodwg Local Board* (1887), 4 Morr. 295). As to supply of gas or water after receiving order or order of adjudication, see *Re Smith, Ex parte Mason*, [1893] 1 Q. B. 323; *Re Flack, Ex parte Berry*, [1900] 2 Q. B. 32.

(*g*) Preferential Payments in Bankruptcy Act, 1888 (51 & 52 Vict. c. 62), s. 1 (1) (a).

(*h*) The wages or salary must be in respect of personal services rendered by the clerk or servant, not those which he pays someone else to render (*Cairney* v. *Back*, [1906] 2 K. B. 746). A clerk paid partly by salary and partly by commission has been held to be within the sub-section, though all the salary due before the receiving order was paid (*Re Klein, Ex parte Goodwin* (1906), 22 T. L. R. 664). See also *Re Earle's Shipbuilding and Engineering Co.*, [1901] W. N. 78.

(*i*) That is, next before that date (*Ex parte Fox, Re Smith* (1886), 17 Q. B. D. 4). The appointment of the official receiver as interim receiver is equivalent to a receiving order for the purposes of this clause (*ibid.*).

(*k*) Preferential Payments in Bankruptcy Act, 1888 (51 & 52 Vict. c 62), s. 1 (1) (b). The question who is a clerk or servant has been often raised under successive Acts of Parliament relating to this subject. A managing

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Wages.

(3) all wages of any labourer or workman, whether payable for time or for piece-work (*l*), in respect of services rendered to the bankrupt during two months before the date of the receiving order, not exceeding £25, but a labourer in husbandry who has contracted for the payment of a part of his wages in a lump sum at the end of his year of hiring will have priority in respect of the whole or a part of such sum, as the court may decide to be due under the contract, proportionate to the time of service up to the date of the receiving order (*m*).

Preferential claims to be a charge on goods distrained.

Where a landlord or other person distrains on a bankrupt's goods within three months before the date of the receiving order, debts for rates, taxes, salaries, and wages, to which priority is given as above mentioned, will be a first charge on the goods distrained on, or the proceeds of the sale thereof, but the landlord or such other person will as regards any money paid under such charge have the same rights of priority as the person to whom the money is paid (*n*).

Rule as to joint and separate estates.

360. As regards partners the general rule is that the joint estate

director of a limited company is not a clerk or servant within the above clause, which is applicable also in the winding up of a company (*Re Newspaper Proprietary Syndicate, Ltd.*, [1900] 2 Ch. 349), nor was a music-master or a drill sergeant who attended a school twice weekly, receiving as payment so much an hour or lesson (*Ex parte Walter, Re Heath* (1873), L. R. 15 Eq. 412 (under Bankruptcy Act, 1869 (32 & 33 Vict. c. 71)); but an artist engaged to sing during an opera season may under a special contract be within the provision (*Re Winter German Opera* (1907), 23 T. L. R. 662). The older Acts required something more than a mere weekly hiring (*Ex parte Collier* (1834), 4 Deac. & Ch. 520). If there was that, it was not material that the salary was paid weekly (*Ex parte Humphreys* (1833), 3 Deac. & Ch. 114). The mate of a ship (*Ex parte Homborg* (1842), 2 Mont. D. & De G. 642), a traveller at an annual salary (*Ex parte Neal, Re Badnall* (1829), Mont. & M. 194), and the city editor of a newspaper (*Ex parte Chipchase, Re Stiff* (1862), 11 W. R. 11), have been held to be clerks or servants. But these words did not under the older Acts include workmen paid by the day or the week (*Ex parte Crawfoot, Re Streather* (1831), Mont. 270), nor a man employed by the job (*Ex parte Grellier, Re Macneil* (1831), Mont. 264). As the priority given to clerks and servants is now limited to wages or salary in respect of services rendered to the bankrupt during four months next before the date of the receiving order (*Ex parte Fox, Re Smith* (1886), 17 Q. B. D. 4), questions may arise as to how far the priority will prevail where no services were actually rendered. Under the older Acts, where the priority was not so limited, a clerk was held entitled to it when, by his employer's permission, he was absent for some time owing to illness (*Ex parte Harris, Re Closson* (1845), De G. 165), or where no services were rendered owing to the master's inability to pay for them (*Ex parte Sanders, Re Green* (1836), 2 Mont. & A. 684). Compare *Ex parte Gee, Re Sawer* (1839), Mont. & Ch. 99, where the clerk's salary, by agreement with the master, was treated as an ordinary debt; *Ex parte Hampson, Re Burkill* (1842), 2 Mont. D. & De G. 462 (misconduct of clerk).

(*l*) See *Ex parte Allsop, Re Disney* (1875), 32 L. T. 433 (under Bankruptcy Act, 1869 (32 & 33 Vict. c. 71), s. 32); *Re Field* (1887), 4 Morr. 63 (foreman of brickyard who was paid no wages, but so much a thousand for bricks, and who, as well as the men employed by him, was liable to dismissal). Labourers paid and engaged by one who is paid for piece-work would not, it is submitted, in the absence of a contract with the bankrupt, have priority. See *Ex parte Ball, Re Byrom* (1853), 3 De G. M. & G. 155.

(*m*) Preferential Payments in Bankruptcy Act, 1888 (51 & 52 Vict. c. 62), s. 1 (1) (c). See, as to proof, Bankruptcy Rules, r. 220, Appendix, Forms, No. 73.

(*n*) Preferential Payments in Bankruptcy Act, 1888 (51 & 52 Vict. c. 62) s. 1 (4). As to rights of landlord and others to distrain, see pp. 221, 291, *post*.

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is to be first applied in payment of the joint debts, and the separate estate of each partner in payment of his separate debts. If there is a surplus of the separate estates it is to be dealt with as part of the joint estate, whilst if there is a surplus of the joint estate it is to be dealt with as part of the respective separate estates in proportion to each partner's right and interest in the joint estate (*o*). There may, however, be cases in which the estates, being inextricably blended, may be consolidated (*p*).

Exceptions.

361. To the above rule as to priorities in the case of joint and separate debts the following exceptions appear to exist:

(1) Joint creditor petitioner against one partner.

Where a joint creditor is the petitioning creditor in respect of his joint debt against one partner (*q*), he may prove in competition with the separate creditors of that partner (*r*); and this is so even where that partner owes him a separate debt sufficient for a petition (*s*).

(2) Where no joint estate.

A joint creditor may prove in competition with the separate creditors where there is no joint estate and no solvent partner (*t*) or co-contractor (*a*).

(3) Where property fraudulently converted.

Where partnership property has been fraudulently converted by one partner, proof may be made on behalf of the joint estate against his separate estate, and proof may be made against the joint estate on behalf of the separate estate of a partner whose property has been fraudulently converted by the firm (*b*).

(*o*) Bankruptcy Act, 1883 (46 & 47 Vict. c. 52), s. 40 (3). See Bankruptcy Rules, r. 293, as to keeping distinct accounts of joint and separate estates, and as to transfer of surplus from one estate to another; r. 270 as to fixing trustee's remuneration in the case of the joint and the separate estates; r. 127 as to apportionment of costs up to the receiving order by the official receiver; r. 269 as to where one or two members of a partnership constitute a separate firm, and as to transfer of surplus in such case.

(*p*) *Re Kriegel, Ex parte Trotman* (1893), 10 Morr. 99; *Re Macfadyen*, [1908] W. N. 32.

(*q*) Bankruptcy Act, 1883 (46 & 47 Vict. c. 52), s. 110.

(*r*) *Ex parte Ackerman* (1808), 14 Ves. 604; *Ex parte Brown, Re Brown and Scott* (1812), 1 Rose, 432. If the petition were against the debtor as surviving partner of a firm, however, the proof would be against the joint estate (*Ex parte Barned, Re Tarlton* (1823), 1 Gl. & J. 309).

(*s*) *Ex parte Burnett, Re Blake* (1841), 2 Mont. D. & De G. 357.

(*t*) *Ex parte Kensington* (1808), 14 Ves. 447; *Ex parte Bauerman & Christie* (1838), 3 Deac. 476; *Re Budgett*, [1894] 2 Ch. 557. A partner would be considered solvent till judicially declared to be insolvent (*Ex parte Janson, Re Corf* (1818), 3 Madd. 229; *Re Carpenter, Ex parte Besley & Wilson* (1890), 7 Morr. 270; *Re Beauchamp Brothers, Ex parte Carr* (1896), 3 Mans. 207, *per* VAUGHAN WILLIAMS, J., at p. 208). The solvent partner must be in this country (*Ex parte Pinkerton* (1801), 6 Ves. 814, n.).

(*a*) *Ex parte Field, Re Rogers* (1842), 3 Mont. D. & De G. 95; *Hoare* v. *Oriental Bank Corporation* (1877), 2 App. Cas. 589. Compare *Ex parte Crosfield, Re Cooper* (1836), 2 Mont. & A. 542; *Ex parte Buckingham* (1840), 1 Mont. D. & De G. 235. See, as to adjustment where the proof is against one only of the separate estates, *Ex parte Willock, Re Dawes* (1816), 2 Rose, 392. A joint creditor may also prove against a separate estate if he pays in full all the separate debts (*Ex parte Chandler* (1803), 9 Ves. 35).

(*b*) *Ex parte Harris, Re Ramsay & Aldrich* (1813), 1 Rose, 437; *Ex parte Young, Re Slaney* (1814), 2 Rose, 40; *Ex parte Smith, Re Harding* (1821), 1 Gl. & J. 74 (exception not applicable where the transaction appears openly in the books of the firm); *Ex parte Sillitoe, Re Goodchilds & Co.* (1824), 1 Gl. & J. 374; *Ex parte Watkins, Re Sikes* (1828), Mont. & M. 57; *Ex parte Hinds, Re*

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(4) Where partners trade apart.

Again, where one or more members of a firm carry on a distinct and separate trade, proof may be made by or on behalf of the firm against the estate or estates of the member or members so carrying on the trade, or *vice versâ*, for a debt which has arisen in the ordinary way as between trade and trade (*c*).

Distinction between joint and separate estates.

362. What is joint and what is separate estate is really a question of fact (*d*). Sometimes the question depends on the true construction of the partnership deed, if there is one (*e*), or upon whether joint estate has been converted into separate estate, or *vice versâ* (*f*). Thus in the ordinary case of one of two partners retiring and assigning his interest in the partnership property to the other, taking an indemnity against the joint debts, if the remaining partner should afterwards become bankrupt, the joint creditors of the firm will have no lien on the partnership property remaining in specie (*g*). The conversion into separate estate, however, must be *bonâ fide*, and not for a fraudulent purpose (*h*), and the agreement for conversion must not be merely executory (*i*).

Generally, apart from any partnership deed or agreement between partners, an outgoing partner has a right to be indemnified against the partnership debts by the appropriation thereto of partnership assets (*k*). That right may, however, be taken away by such deed or agreement where, for instance, the outgoing partner has sold his interest in the partnership assets either for money or for some other consideration, such as a covenant of indemnity against the joint debts (*l*).

Higginson (1849), 3 De G. & Sm. 613; *Read* v. *Bailey* (1877), 3 App. Cas. 94 (immaterial that the estate against which proof is made is not at the time of proof larger by reason of the fraud).

(*c*) *Ex parte St. Barbe* (1805), 11 Ves. 413 (they must not be branches of the same business); *Ex parte Hesham* (1810), 1 Rose, 146; *Ex parte Sillitoe, Re Goodchilds & Co.* (1824), 1 Gl. & J. 374; *Ex parte Castell, Re Wentworth* (1826), 2 Gl. & J. 124; *Ex parte Cook, Re Petherbridge* (1831), Mont. 228 (no proof for money lent); *Ex parte Williams, Re Oliver* (1843), 3 Mont. D. & De G. 433 (where money not lent by bankers as bankers); *Ex parte Maude, Re Braginton* (1867), 2 Ch. App. 550; *Re Ridgway, Ex parte Clarke* (1892), 9 Morr. 269 (trade debt converted into personal debt).

(*d*) *Ex parte Connell* (1838), 3 Deac. 201; *Re Plummer* (1841), 1 Ph. 56; *Re Collie, Ex parte Manchester and County Bank* (1876), 3 Ch. D. 481, where shares on which a bank had a lien stood in the name of one partner, but in reality belonged to the firm, and the bank in proving against the firm was obliged as a secured creditor to value the shares.

(*e*) *Re Head, Ex parte Kemp* (1893), 10 Morr. 76.

(*f*) *Ex parte Ruffin* (1801), 6 Ves. 119; *Ex parte Peake, Re Lightoller* (1816), 1 Madd. 346.

(*g*) *Ex parte Ruffin, supra; Ex parte Fell* (1805), 10 Ves. 347; *Ex parte Williams* (1805), 11 Ves. 3. See also *Ex parte Barrow, Re Slyth* (1815), 2 Rose, 252; *Ex parte Birley, Re Krauss* (1841), 2 Mont. D. & De G. 354.

(*h*) See *Anderson* v. *Maltby* (1793), 2 Ves. 244; *Ex parte Williams, supra; Ex parte Peake, Re Lightoller, supra.*

(*i*) *Ex parte Wheeler, Re Mallam* (1817), Buck, 25; *Re Kemptner* (1869), L. R. 8 Eq. 286. See also *Re Daniel* (1896), 3 Mans. 312.

(*k*) *Re Rowland* (1866), 1 Ch. App. 421; *Ex parte Morley, Re White* (1873), 8 Ch. App. 1026; *Ex parte Dear, Re White* (1875), 1 Ch. D. 514; *Re Daniel* (1896), 3 Mans. 312.

(*l*) *Re Simpson* (1874), 9 Ch. App. 572; *Re Daniel, supra.*

Proof by partner.

363. Neither a partner, nor his estate (*m*), nor his executors (*n*) can prove in competition with the creditors of the firm, who are in fact his own creditors (*o*). But this rule does not apply where no debt has been actually proved against the bankrupt's estate for which the partner seeking to prove, or his executors, was jointly liable with the bankrupt (*p*); nor where the remedy of the joint creditors is, as against a retired partner seeking to prove, statute-barred (*q*); nor where the joint creditors are paid in full (*r*); nor where there could not be any surplus from the separate estate of the bankrupt which would be available for the joint creditors (*s*). But the rule is applicable where joint creditors, whether rightly or wrongly, have been admitted to prove against the bankrupt's estate (*t*).

Landlord's right to prove for rent for which distress not available.

364. A landlord or other person to whom rent is due from the bankrupt may, at any time either before or after the commencement of the bankruptcy (*a*), distrain upon the goods and effects of the bankrupt for rent due to him (*b*). If, however, the distress is levied after the commencement of the bankruptcy, it will be only available for six months' (*c*) rent accrued due prior to the date of the order of adjudication, but the right of proof will remain in respect of any surplus for which the distress is not available (*d*).

A landlord cannot prove and distrain for his rent at the same time (*e*), and his right of distress will be lost if he suffers the goods to leave the premises (*f*). The landlord is not a secured creditor (*g*), and therefore if he does not distrain, or if at the date when the right of distress arises no goods available for distress remain on the premises, his only remedy is to prove for his rent (*h*).

(*m*) *Ex parte Sillitoe, Re Goodchilds & Co.* (1824), 1 Gl. & J. 374; *Ex parte Ellis, Re Badnall* (1827), 2 Gl. & J. 312.

(*n*) *Ex parte Blythe, Re Blythe* (1881), 16 Ch. D. 620.

(*o*) *Ex parte Carter, Re Minchin* (1827), 2 Gl. & J. 233; *Nanson* v. *Gordon* (1876), 1 App. Cas. 195; *Ex parte Blythe, supra; Re Hind,* [illegible] *Ex parte Hind* (1890), 62 L. T. 327. Compare, as to devastavit, *Ex parte Westcott* (1874), 9 Ch. App. 626; *Re Dixon, Ex parte Gordon* (1874), 10 Ch. App. 160, at p. 166; *Ex parte Blythe, supra.*

(*p*) *Ex parte Andrews, Re Wilcoxon* (1884), 25 Ch. D. 505.

(*q*) *Ex parte Hepburn, Re Smith* (1884), 14 Q. B. D. 394.

(*r*) *Ex parte Young, Re Slaney* (1814), 2 Rose, 40; *Ex parte Taylor, Re Elgar* (1814), 2 Rose, 175.

(*s*) *Ex parte Topping, Re Levey* (1865), 13 W. R. 445; *Re Head, Ex parte Head,* [1894] 1 Q. B. 638.

(*t*) *Re Hind, Ex parte Hind, supra.*

(*a*) As to commencement of bankruptcy, see p. 181, *ante.*

(*b*) Bankruptcy Act, 1883 (46 & 47 Vict. c. 52), s. 42 (1).

(*c*) Bankruptcy Act, 1890 (53 & 54 Vict. c. 71), s. 28.

(*d*) Bankruptcy Act, 1883 (46 & 47 Vict. c. 52), s. 42 (1). By sub-s. 2 an order of adjudication in this section will be deemed to include an administration order in the case of a debtor whose debts do not exceed £50 (*ibid.*, s. 122), or of a deceased person who dies insolvent (*ibid.*, s. 125).

Generally as to the landlord's right of distress, see p. 291, *post.*

(*e*) *Ex parte Grove* (1747), 1 Atk. 104.

(*f*) *Ex parte Descharmes* (1742), 1 Atk. 103; *Re Mackenzie, Ex parte Sheriff of Hertfordshire,* [1899] 2 Q. B. 566, 573.

(*g*) *Thomas* v. *Patent Lionite Co.* (1881), 17 Ch. D. 250.

(*h*) Under rule 19 of Sched. II. of the Bankruptcy Act, 1883 (46 & 47 Vict.

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In place of a distress an undertaking is frequently given by the official receiver to pay the landlord the rent for which he is entitled to distrain out of the proceeds of the distrainable goods when sold, and this undertaking will bind the official receiver and trustee (*i*).

Undertaking by official receiver.

Apprentices and articled clerks.

365. Where a person is apprenticed or articled to the bankrupt (*k*) at the time when the bankruptcy petition is presented, the adjudication will, if either the bankrupt or apprentice or articled clerk gives written notice to the trustee to that effect, be a complete discharge of the apprenticeship indenture or articles of agreement. If any money has been paid by or on behalf of the apprentice or clerk to the bankrupt as a fee, the trustee may, if applied to, pay such sum as he, subject to an appeal to the court (*l*), thinks reasonable out of the bankrupt's property to or for the use of the apprentice or clerk. In fixing the sum regard is had to the amount of the fee paid, the actual time of service before the commencement of the bankruptcy, and the other circumstances of the case (*m*). Instead of following this course, the trustee may, if he thinks it expedient, and if application is made to him by or on behalf of the apprentice or clerk, transfer the indenture of apprenticeship or articles to another person (*n*).

Deferred debts.

366. There are two classes of creditors whose debts are postponed by statute until all other creditors for valuable consideration have been satisfied.

Loan by wife to husband for trade.

In the first place, any money or estate of a wife lent or intrusted by her to her husband, for the purpose of any trade or business carried on by him or otherwise (*o*), must be treated as assets of her husband's estate in case of his bankruptcy, but the wife

c. 52), a right of proof is given for rent up to the date of the receiving order, but future rent can only be proved for if there is a disclaimer of the lease (*per* VAUGHAN WILLIAMS, L.J., in *Re New Oriental Bank Corporation* (No. 2), [1895] 1 Ch. 753, at p. 756).

(*i*) *Re Chapman, Ex parte Goodyear* (1894), 10 T. L. R. 449.

(*k*) *Semble*, it is sufficient if the bankrupt has been paid the fee, and the agreement has been made though not embodied in an indenture or articles (*Ex parte Haynes, Re Donkin* (1826), 2 Gl. & J. 122).

(*l*) In the High Court, at all events, the appeal may be heard by the registrar (*Re Richardson, Ex parte Gould* (1887), 4 Morr. 47).

(*m*) Bankruptcy Act, 1883 (46 & 47 Vict. c. 52), s. 41 (1).

(*n*) *Ibid.*, s. 41 (2).

See *ibid.*, s. 52, as to stipend of beneficed clergyman who becomes bankrupt, and payment to curate out of profits of benefice four months' salary, not exceeding £50, before date of receiving order, and p. 190, *ante*.

Under the Small Dwellings Acquisition Act, 1899 (62 & 63 Vict. c. 44), local authorities have power to make advances enabling persons to acquire the ownership of small houses, and such authorities in case of bankruptcy of the proprietor of a house, or the administration in bankruptcy of his estate if deceased, may take possession or order the sale of the house, unless other arrangements are made with the trustee (*ibid.*, s. 3 (5)). See further, title PUBLIC HEALTH ETC.

(*o*) There is no postponement if the loan to the husband was not for trade or business (*Re Tidswell, Ex parte Tidswell* (1887), 4 Morr. 219; *Mackintosh v. Pogose*, [1895] 1 Ch. 505; *Re Clark, Ex parte Schulze*, [1898] 2 Q. B. 330), nor where the wife, having been surety for the bankrupt, has paid the creditor and then comes in to prove (*Re Cronmire, Ex parte Cronmire*, [1901] 1 K. B. 480).

will have a claim to a dividend as a creditor for the amount or value of such money or estate after all claims of the other creditors of the husband for valuable consideration in money or money's worth have been satisfied (*p*). Until they have been so satisfied the wife cannot even vote (*q*). But where the money has been lent to a firm of which the husband is a partner there is no postponement of the wife's right to vote and prove (*r*).

Loan for business purposes.

Secondly, where a loan is made to a person engaged or about to engage in any business on a contract with that person that the lender is to receive a rate of interest varying with the profits or a share of the profits arising from carrying on the business (*s*), then if the borrower is adjudged bankrupt, or enters into an arrangement to pay his creditors less than twenty shillings in the pound, or dies in insolvent circumstances, the lender will not, whether the contract was in writing or oral (*t*), be entitled to recover anything in respect of his loan, or even to prove his debt (*u*), until the claims of the other creditors of the borrower for valuable consideration in money or money's worth have been satisfied (*v*). The creditor who is party to such a contract will be so postponed, though the contract is for payment of a fixed sum out of the profits (*w*), or, where that is the real contract, though the fixed sum is described as a salary (*x*), or where a certain sum is to be paid for interest from which, if the borrower should be unable to pay it, a certain defined allowance

(*p*) Married Women's Property Act, 1882 (45 & 46 Vict. c. 75), s. 3. This Act is not affected by the Bankruptcy Act, 1883 (46 & 47 Vict. c. 52). See s. 152 of the latter Act.

(*q*) *Re Genese, Ex parte District Bank of London* (1885), 16 Q. B. D. 700. It would seem from this case that the onus is on the wife to show that the money was not lent for the husband's trade or business. This, however, does not appear to be so where the wife shows a *primâ facie* right to prove (*Re Cronmire, Ex parte Cronmire*, [1901] 1 K. B. 480).

(*r*) *Re Tuff, Ex parte Nottingham* (1887), 19 Q. B. D. 88.

(*s*) A contract for a loan on these terms will not of itself, provided it be in writing and signed by or on behalf of all the parties thereto, make the lender a partner (Partnership Act, 1890 (53 & 54 Vict. c. 39), s. 2 (3) (d)). As to when there will be a partnership, see title PARTNERSHIP, and *Ex parte Delhasse, Re Megevand* (1878), 7 Ch. D. 511; *Ex parte Tennant, Re Howard* (1877), 6 Ch. D. 303; *Walker* v. *Hirsch* (1884), 27 Ch. D. 460; *Badeley* v. *Consolidated Bank* (1888), 38 Ch. D. 238; *Davis* v. *Davis*, [1894] 1 Ch. 393; *Re Young, Ex parte Jones*, [1896] 2 Q. B. 484.

(*t*) *Re Fort, Ex parte Schofield*, [1897] 2 Q. B. 495.

(*u*) *Ex parte Taylor, Re Grason* (1879), 12 Ch. D. 366; and see *Ex parte Mills, Re Tew* (1873), 8 Ch. App. 569.

(*v*) Partnership Act, 1890 (53 & 54 Vict. c. 39), ss. 2, 3, which replace s. 5 of the Act to amend the Law of Partnership, 1865 (28 & 29 Vict. c. 86, known as Bovill's Act), which section was left untouched by s. 40 of the Bankruptcy Act, 1883 (46 & 47 Vict. c. 52), and by the Preferential Payments in Bankruptcy Act, 1888 (51 & 52 Vict. c. 62) (see s. 2 of the last-mentioned Act).

(*w*) *Re Young, Ex parte Jones*, [1896] 2 Q. B. 484.

(*x*) *Re Stone* (1886), 33 Ch. D. 541. The time when the loan was made is the important one (*ibid.*; *Ex parte Mills, Re Tew, supra*). If by the terms of the original contract the case falls within the section no alteration will take it out of it which does not amount to a repayment of the loan and the making of a fresh one (*ibid.*; *Re Hildesheim, Ex parte the Trustee*, [1893] 2 Q. B. 357). See also *Re Mason, Ex parte Bing*, [1899] 1 Q. B. 810, where the original loan was to two partners, and, the partnership having been dissolved, the remaining partner took over the liabilities of the firm.

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would be made (*y*). Where money is lent to a person engaged in business at interest varying with the profits, and security is given for the loan, the lender's rights in the security will not be affected by the bankruptcy of the borrower (*z*).

Sale of goodwill for share of profits.

In the same way where a person sells the goodwill of his business and receives in consideration thereof, by way of annuity or otherwise, a portion of the profits of the business, such receipt of itself will not make him a partner in the business or liable as such. But if the buyer is adjudged bankrupt, enters into an arrangement to pay his creditors less than twenty shillings in the pound, or dies in insolvent circumstances, the seller of the goodwill cannot prove or recover anything in respect of the profits, until the claims of all the other creditors of the buyer for valuable consideration in money or money's worth have been satisfied (*a*).

Interest exceeding 5 per cent.

367. Where a creditor has proved for a debt bearing interest at a rate exceeding 5 per cent. per annum, the interest can be calculated at 5 per cent. per annum only for the purposes of dividend, and he can only receive the higher rate of interest after all debts proved have been paid in full (*b*).

SUB-SECT. 4.—*Secured and Unsecured Creditors.*

Definition of secured creditor.

368. A secured creditor means a person who holds a mortgage, charge, or lien on the debtor's property, or any part of it, as a security for a debt due to him from the debtor (*c*). If the property is the property of a third party, or of the bankrupt and a third party jointly, proof may be made regardless of it, the test being whether the property if given up would augment the bankrupt's estate (*d*). What is or is not a security on the property of a debtor is a question of fact (*e*).

(*y*) *Re Vince, Ex parte Baxter*, [1892] 1 Q. B. 587, reversed in the Court of Appeal, [1892] 2 Q. B. 478, but only on the ground that the "due allowance" mentioned in the contract was unintelligible, and that the contract was therefore inoperative.

(*z*) *Ex parte Sheil, Re Lonergan* (1877), 4 Ch. D. 789; *Badeley* v. *Consolidated Bank* (1888), 38 Ch. D. 238.

(*a*) Partnership Act, 1890 (53 & 54 Vict. c. 39), ss. 2, 3; *Ex parte Taylor, Re Grason* (1879), 12 Ch. D. 366. But where a person sells a business in consideration of an annuity to be paid, which annuity is not stated to be payable out of the profits, the seller's right of proof against the buyer's estate will not be postponed (*Re Gieve, Ex parte Shaw* (1899), 6 Mans. 249).

(*b*) Bankruptcy Act, 1890 (53 & 54 Vict. c. 71), s. 23. Compare *Re Holland, Ex parte Parker and Young* (1894), 1 Mans. 508; *Re Nepean*, [1903] 1 K. B. 794. See also p. 232, *post*.

(*c*) Bankruptcy Act, 1883 (46 & 47 Vict. c. 52), s. 168 (1). See p. 45, *ante*.

(*d*) *Ex parte English and American Bank, Re Fraser, Trenholm & Co.* (1868), 4 Ch. App. 49; *Ex parte West Riding Union Banking Co., Re Turner* (1881), 19 Ch. D. 105. No credit need be given by a creditor in his proof for a voluntary payment made by a stranger in respect of a loss caused by the bankrupt (*Re Rowe, Ex parte Derenburg & Co.*, [1904] 2 K. B. 483). Money paid into court by a defendant under R. S. C., Ord. 22, r. 6, with a defence denying liability, must, if the trustee admits the plaintiff's claim, be treated by the plaintiff as a security (*Re Gordon, Ex parte Navalchand*, [1897] 2 Q. B. 516).

(*e*) As to the rights of creditors under executions and their security, see p. 271, *post*.

SUB-SECT. 4. Secured and Unsecured Creditors.

369. An unsecured creditor may prove for the whole amount of his debt, if it is provable, but a secured creditor must account in some way for the value of his security (*f*).

For the purposes of the above rule as to proof by secured creditors the joint estate of partners is to be considered as different from the separate estate of any partner; therefore a partnership creditor having a security for his debt on the separate estate of one partner need not value nor give up his security (*g*), and conversely a creditor of one partner is not obliged to give up or value a security which he holds on the joint estate (*h*).

Distinction in respect of proof.

Partners.

But where A. and B., owners in common of a lease, deposit it with a bank to secure a loan to A., and A. becomes bankrupt, the bank must deduct a moiety of the value of the lease, for in this case the security is on A.'s separate estate, not on the joint estate (*i*).

Owners in common.

A creditor having a lien on shares standing in the name of one debtor must, in proving against the joint estate of the debtor and his partner, treat the shares as security on its being shown that they are partnership property (*j*). But where shares on which a company has a lien for debts of a shareholder are registered in A.'s name, but equitably belong to B., the company is not, for proof or petition in bankruptcy, a secured creditor of B. (*k*). Again, where consignors send goods to the debtor for sale, drawing bills on him which they indorse to bankers to whom they send the bills of lading, and the bills are accepted "payable on the delivery up of the bills of lading," this form of acceptance makes the goods the property of the debtor, so that the bank in proving against the debtor's estate has to treat them as such and prove as secured creditors (*l*). If, however, the debtor has absolutely parted with the property before the receiving order, no question of security arises (*m*).

When debts secured.

A *cestui que trust* may follow, if he can, trust money into an unauthorised investment and yet prove for the whole of the missing fund (*n*), but it is otherwise if by his conduct or otherwise he adopts the investment (*o*).

Unauthorised investment of trust fund.

(*f*) As to proof by secured creditor, see p. 226, *post*.

(*g*) *Ex parte Peacock, Re Bell* (1825), 2 Gl. & J. 27; *Ex parte Bowden, Re Brettell* (1832), 1 Deac. & Ch. 135; *Ex parte West Riding Union Banking Co., Re Turner* (1881), 19 Ch. D. 105; *Ex parte Caldicott, Re Hart* (1884), 25 Ch. D. 716. See cases in next note.

(*h*) See cases in preceding note, and *Ex parte English and American Bank, Re Fraser, Trenholm & Co.* (1868), 4 Ch. App. 49; *Rolfe and the Bank of Australasia* v. *Flower, Salting & Co.* (1865), L. R. 1 P. C. 27.

(*i*) *Ex parte West Riding Union Banking Co., Re Turner, supra.*

(*j*) *Ex parte Connell* (1838), 3 Deac. 201; *Re Collie, Ex parte Manchester and County Bank* (1876), 3 Ch. D. 481; and see *Re Cooksey, Ex parte Portal & Co.* (1900), 83 L. T. 435.

(*k*) *Re Perkins, Ex parte Mexican Santa Barbara Mining Co.* (1890), 24 Q. B. D. 613. Compare *Bradford Banking Co.* v. *Briggs* (1886), 12 App. Cas. 29.

(*l*) *Ex parte Brett, Re Howe* (1871), 6 Ch. App. 838. See *Re Cooksey, Ex parte Portal & Co., supra*, where the property was the bankrupt's, though represented by him to be his wife's.

(*m*) *Re Hallett & Co., Ex parte Cocks, Biddulph & Co.*, [1894] 2 Q. B. 256, where a promissory note in favour of the debtors and the guarantee of a third party for its payment had been handed to the creditors with the intention that they should become their property.

(*n*) *Ex parte Biddulph, Re Biddulph* (1849), 3 De G. & Sm. 587; *Re Oatway*, [1903] 2 Ch. 356.

(*o*) *Re Lake, Ex parte Howe Trustees*, [1903] 1 K. B. 439.

SUB-SECT. 4. Secured and Unsecured Creditors.

Appropriation of securities.

370. Where property of one partner is held as a security both for his debt and that of his firm, the creditor may realise it and pay himself the partner's debt in full, and then, placing the balance of the security to a suspense account, prove for the whole amount of the joint debt (*p*). In such a case he can appropriate his security to the best advantage, and the court would if necessary in a proper case order a dividend on the joint estate to be declared before one on the separate estate (*q*).

Bills of exchange etc.

371. Particulars of all bills of exchange and other negotiable securities held by a creditor, whether they are to be treated as securities on the debtor's estate or not, must be set out by him in his proof (*r*).

When securities.

Where bills bearing the debtor's and other names are indorsed by the debtor to a creditor, the test as to whether they should be valued as securities or not is whether the indorsement was intended to make the debtor as well as the other parties liable (*s*). Thus valuation appears not to be necessary if the bills were indorsed without recourse against the debtor (*s*), or if they were deposited as mere chattels, or if the indorsement was merely for the purpose of collection (*t*).

Amount recoverable on bills.

Generally where a bill bearing the names of third parties is indorsed and handed to a creditor he can proceed against all parties to the bill till he receives twenty shillings in the pound and interest (*w*).

Rights of secured creditors.

372. A secured creditor must comply with the following rules, or he will be excluded from all share in any dividend (*a*).

Realisation.

If a secured creditor realises his security, he may prove for the balance of principal and interest, if any, due at the date of the receiving order. The net proceeds of such realisation must not be applied to interest accrued after such date, but profits made from an unrealised security after such date may be so applied (*b*). The net

(*p*) *Ex parte Watson, Re J. B. Walker & Co.* (1880), 28 W. R. 632.

(*q*) *Ex parte Dickin, Re Foster* (1875), L. R. 20 Eq. 767; and see Bankruptcy Act, 1883 (46 & 47 Vict. c. 52), s. 59 (2). As to joint and separate dividends, see p. 238, *post*.

(*r*) Bankruptcy Rules, r. 219, and Appendix, Forms, No. 72; *Re Ruthen, Ex parte Kidd* (1898), 5 Mans. 227. For voting purposes the liability of other parties liable before the debtor on the bills must be treated as security and valued (Bankruptcy Act, 1883 (46 & 47 Vict. c. 52), Sched. I., r. 11). A bill or other negotiable instrument in respect of which a creditor proves, whether for voting or dividend, must, in the absence of a special order, be produced (Bankruptcy Rules, r. 221), and again before a dividend is paid on it (*ibid.*, r. 233).

(*s*) *Ex parte Schofield, Re Firth* (1879), 12 Ch. D. 337, 347.

(*t*) *Ibid.*; *Dawson* v. *Isle*, [1906] 1 Ch. 633. *Semble*, there might be an indorsement where the bills were intended to be kept as security (*ibid.*). See also *Ex parte Twogood* (1812), 19 Ves. 229; *Ex parte Britten* (1833), 3 Deac. & Ch. 35; *Ex parte Brunskill, Re Bentley* (1835), 2 Mont. & A. 220.

(*w*) *Ex parte Martin, Re Fowler* (1814), 2 Rose, 87; *Ex parte Sammon* (1832), 1 Deac. & Ch. 564; *Ex parte Reed* (1833), 3 Deac. & Ch. 481; *Ex parte Newton, Re Bunyard* (1880), 16 Ch. D. 330. Any surplus received by the creditor would belong to the debtor or his trustee (*Re Morris*, [1899] 1 Ch. 485). See further, as to bills of exchange, p. 205, *ante*.

(*a*) Bankruptcy Act, 1883 (46 & 47 Vict. c. 52), Sched. II., r. 16.

(*b*) *Ibid.*, Sched. II., r. 9. See *Ex parte Penfold* (1851), 4 De G. & Sm. 282

SUB-SECT. 4. Secured and Unsecured Creditors.

proceeds may, however, be allocated towards satisfying interest due to the creditor in excess of 5 per cent. per annum, in respect of which in the first instance his right to dividend is postponed (*c*).

The receiving order does not affect the right of a secured creditor to realise or otherwise deal with his security (*d*), but where necessary, on the application of any person who claims to be a mortgagee of realty or leaseholds belonging to the bankrupt, the court may inquire if he is a mortgagee, and, on finding that he is, may direct the usual accounts to be taken (*e*), and in a proper case may order a sale, with liberty to the mortgagee to bid, the conduct of such sale to be in the hands of the trustee or other person as ordered, and all proper parties to join in the conveyance (*f*). The proceeds of sale will be applied first in payment of the costs, charges, and expenses of the trustee of and incident to the application, then of the principal, interest, and costs of the mortgagee, the surplus, if any, going to the estate. If there is a deficiency the mortgagee may prove for it, but not so as to disturb a dividend already paid (*g*).

Mortgagee of land.

A mortgagee is not obliged, however, to realise his security in the bankruptcy court, but may take proceedings, whether for foreclosure or otherwise, in the Chancery Division (*h*).

373. The second course open to a secured creditor is to surrender his security to the estate, in which case he may prove for his whole debt (*i*).

Surrender.

374. In the third place, if he neither realises nor surrenders his security he must, before ranking for dividend, state in his proof the particulars, date, and the value at which he assesses his security, and he will receive dividends only in respect of the balance remaining

Valuation.

Re Savin (1872), 7 Ch. App. 760; *Quartermaine's Case*, [1892] 1 Ch. 639; *Re Bonacina, Ex parte Discount Banking Co.* (1894), 1 Mans. 59.

(*c*) Bankruptcy Act, 1890 (53 & 54 Vict. c. 71), s. 23; *Re Fox and Jacobs, Ex parte Discount Banking Co. of England and Wales*, [1894] 1 Q. B. 438. See p. 233, *post*.

(*d*) Bankruptcy Act, 1883 (46 & 47 Vict. c. 52), s. 9 (2). But he cannot, with notice of an available act of bankruptcy, hand it back to the debtor against payment (*Ponsford Baker & Co.* v. *Union of London and Smith's Bank, Ltd.*, [1904] 2 Ch. 444). As to the position of the holder of a bill of sale, see p. 64, *ante*, and title BILLS OF SALE.

(*e*) As in the Chancery Division (Bankruptcy Rules, r. 77).

(*f*) *Ibid.*, rr. 73, 74. For the purposes of all these rules, all parties may be examined by the court, and must produce as directed all deeds and documents in their power (r. 76). If the security is insufficient the conduct of the sale may be, and generally is, given to the mortgagee (*Re Jordan, Ex parte Harrison* (1884), 13 Q. B. D. 228).

(*g*) Bankruptcy Rules, r. 75. It would seem that the court may disallow the trustee's costs in a proper case (*Re Jordan, supra*).

(*h*) See *White* v. *Simmons* (1871), 6 Ch. App. 555; *Ex parte Pannell, Re England* (1877), 6 Ch. D. 335; *Waddell* v. *Toleman* (1878), 9 Ch. D. 212; *Ex parte Hirst, Re Wherly* (1879), 11 Ch. D. 278. Compare, as to specific performance, *Re Jewell* (1897), 4 Mans. 28.

(*i*) Bankruptcy Act, 1883 (46 & 47 Vict. c. 52), Sched. II., r. 10. The surrender of the security under this rule does not discharge a surety (*Rainbow* v. *Juggins* (1880), 5 Q. B. D. 422). The surrender by a first mortgagee of his security puts the trustee in his place, and does not accelerate the rights of subsequent mortgagees (*Cracknall* v. *Janson* (1877), 6 Ch. D. 735). Compare, however, *Moor* v. *Anglo-Italian Bank* (1879), 10 Ch. D. 681, at p. 690. See also *Bell* v. *Sunderland Building Society* (1883), 24 Ch. D. 618.

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after deduction of the assessed value (*k*). In valuing his security a secured creditor may take into account his costs and expenses incurred in defending it, as well as any loss which has arisen on it without his default (*l*).

Before 1895 it was the practice for a creditor to lump debts and securities together for the purpose of proof, but if this is done, and the trustee should desire to redeem a particular security, he may call upon the creditor to value it separately (*m*). The proper practice now is to value each security separately.

Voting by secured creditor.

375. For voting purposes a secured creditor who does not surrender his security must value it as before stated, and prove for the balance after deducting the value (*n*). By stating that the security is worthless he does not omit to value it (*o*). If he votes for his whole debt, he will be deemed to have surrendered his security, unless the court is satisfied that the omission to value has arisen from inadvertence (*p*). He will not be deemed to have surrendered it unless he has really elected to abandon it, that is, omitted to value it deliberately and on purpose. If his omission was accidental, he ought to be relieved on terms (*q*).

Trustee's right to redeem.

376. The trustee may at any time redeem a security by payment to the creditor of the assessed value (*r*), or, if dissatisfied with the amount, he may require (*s*) the security to be offered for sale on terms and conditions to be agreed on or directed by the court, the creditor and the trustee having a right to bid if the sale be by public auction (*t*). But the trustee's power to redeem or require the realisation of a security will be lost if, after receipt of a written

Loss of right to redeem.

(*k*) Bankruptcy Act, 1883 (46 & 47 Vict. c. 52), Sched. II., r. 11. See for an unsuccessful attempt to divide a secured debt and allocate security to one part, *Baines* v. *Wright* (1885), 16 Q. B. D. 330.

(*l*) *Ex parte Carr, Re Hofmann* (1879), 11 Ch. D. 62; *Quartermaine's Case*, [1892] 1 Ch. 639, at p. 650. See, as to valuation of a policy of life assurance, *Deering* v. *Bank of Ireland* (1886), 12 App. Cas. 20. As a rule, a mortgagee in seeking to prove for dividend or otherwise need not produce any title-deeds beyond his mortgage deed (*Ex parte Cass, Re Dunkley* (1881), 45 L. T. 560).

(*m*) *Re Smith and Logan, Ex parte Fletcher and Brandon* (1895), 2 Mans. 70. See also *Re Morris*, [1898] 2 Ch. 413, affirmed on appeal, [1899] 1 Ch. 485, where creditors, having no claim against the debtors except as indorsers of four bills, in respect of which, from one source or another, they received more than twenty shillings in the pound on two, and less than twenty shillings in the pound on the other two, were compelled to separate the bills, and pay to the trustee the surplus received in respect of two of them.

(*n*) Bankruptcy Act, 1883 (46 & 47 Vict. c. 52), Sched. I., r. 10.

(*o*) *Re Piers, Ex parte Piers*, [1898] 1 Q. B. 627.

(*p*) Bankruptcy Act, 1883 (46 & 47 Vict. c 52), Sched. I., r. 10. Inadvertence is not the same as mistake, and does not cover deliberate election, though based on false grounds (*Re Piers, supra; Re Rowe, Ex parte West Coast Gold Fields, Ltd.*, [1904] 2 K. B. 489).

(*q*) *Re Safety Explosives, Ltd.*, [1904] 1 Ch. 226, following *Ex parte Clarke, Re Burr* (1892), 67 L. T. 232. See also *Re King, Ex parte Mesham* (1885), 2 Morr. 119; *Re Henry Lister & Co., Ltd., Ex parte Huddersfield Banking Co.*, [1892] 2 Ch. 417.

(*r*) Bankruptcy Act, 1883 (46 & 47 Vict. c. 52), Sched. II., r. 12 (a). See, as to amount at which trustee can redeem, *Knowles* v. *Dibbs* (1889), 60 L. T. 291. See also *Sanguinetti* v. *Stuckey's Banking Co.* (No. 2), [1896] 1 Ch. 502.

(*s*) Possibly this only enables the trustee indirectly to compel realisation. Compare *Ex parte Good, Re Lee* (1880), 14 Ch. D. 82, *per* COTTON, L.J., at p. 100. As to reservation of dividend where creditor cannot realise in time, see *ibid.*

(*t*) Bankruptcy Act, 1883 (46 & 47 Vict. c. 52), Sched. II., r. 12 (b).

notice from the creditor requiring him to elect whether he will exercise such power or not, he fails within six months to give written notice to the creditor of his election to exercise it, in which case the trustee's interest in the security will vest in the creditor, the amount of whose debt will be reduced by the value which he has put on the security (*u*).

Right of debtor to redeem.

Where a secured creditor values his security and proves for the balance, and the trustee does not redeem, and the bankruptcy is annulled on the approval of a composition, the debtor can redeem the security upon payment of the assessed value and interest from the date of proof (*a*).

Amount recoverable.

Subject to the provisions above stated, enabling a secured creditor in effect to foreclose the trustee and become the absolute owner of the property on which he has a security, a creditor can in no case receive more than twenty shillings in the pound and interest at £4 per cent. per annum in the event of the realisation of the estate showing a surplus (*b*).

Redemption in case of petitioning creditor.

377. If the estimate made in the petition by a secured petitioning creditor is not a mere sham, he complies with the Act, and the trustee cannot redeem the security at the value estimated in the petition unless the creditor proves, but in case of proof the creditor would be bound by the estimate made in his proof, at all events in the absence of mistake. If he states in his petition that he is willing to give up the security if the debtor is adjudged bankrupt, he cannot prove without giving it up (*c*).

Amendment of valuation.

378. A creditor, on showing to the satisfaction of the trustee or the court that a valuation and proof were made *bonâ fide* on a mistaken estimate, or that the security has diminished or increased in value since its previous valuation, may at any time amend the valuation and proof, but, unless the trustee allows the amendment, at his own cost and on such terms as the court may order (*d*). There must, however, be some limit of time for amendment, and if after the notice above referred to requiring the trustee to elect whether he will redeem the trustee signifies his election to purchase at the creditor's valuation, the creditor, it would seem, cannot amend (*e*). But where no such notice has been given, an intimation from the trustee that he intends to purchase, even if the amount be tendered, will not prevent amendment (*f*); and amendment will be allowed where a security has increased in value, though by reason of the first valuation a scheme offered to the creditors cannot be carried (*g*).

(*u*) Bankruptcy Act, 1883 (46 & 47 Vict. c. 52), Sched. II., r. 12 (c).

(*a*) *Pearce* v. *Bullard King & Co.* (1908), 24 T. L. R. 353.

(*b*) Bankruptcy Act, 1883 (46 & 47 Vict. c. 52), Sched. II., r. 17.

(*c*) See *Re Button, Ex parte Voss*, [1905] 1 K. B. 602, where the previous cases *Ex parte Taylor, Re Lacey* (1884), 13 Q. B. D. 128, and *Re Vautin, Ex parte Saffery*, [1899] 2 Q. B. 549, were discussed.

(*d*) Bankruptcy Act, 1883 (46 & 47 Vict. c. 52), Sched. II., r. 13.

(*e*) *Ex parte Norris, Re Sadler* (1886), 17 Q. B. D. 728. See under Bankruptcy Act, 1869 (32 & 33 Vict. c. 71), *Ex parte King, Re Palethorpe* (1875), L. R. 20 Eq. 273; *Couldery* v. *Bartrum* (1881), 19 Ch. D. 394; *Société Générale de Paris* v. *Geen* (1883), 8 App. Cas. 606.

(*f*) *Ex parte Norris, supra; Re Newton, Ex parte National Provincial Bank*, [1896] 2 Q. B. 403.

(*g*) *Re Fanshawe, Ex parte Le Marchant*, [1905] 1 K. B. 170.

SUB-SECT. 4. Secured and Unsecured Creditors.

The existence of a subsequent incumbrancer does not affect the creditor's right to amend (*h*).

Effect of amendment.

379. On the amendment of a valuation the creditor must repay any excess of dividend received beyond what he would have been entitled to on the basis of the new valuation, or, as the case may be, he will receive out of any money for the time being available for dividend, before it is made applicable to the payment of any future dividend, any share of dividend on that basis which he has failed to receive, but he must not disturb any dividend declared before the amendment (*i*).

Realisation after valuation.

Again, if after valuation of a security the creditor realises it, or it is realised at the instance of the trustee (*k*), the net amount realised is to be substituted for the valuation and treated in all respects as an amended valuation (*l*).

SUB-SECT. 5.—*Mode of Proof in General.*

Affidavit verifying debt.

380. A proof of debt may be made by the creditor delivering or sending in a prepaid letter to the official receiver, or to the trustee if appointed, an affidavit verifying his debt (*m*). The affidavit may be made by the creditor himself or by some person authorised by him or on his behalf. If made by a person so authorised it must state his authority and means of knowledge (*n*).

Time for proof.

Though by the Act (*o*) every creditor "shall" prove his debt as soon as may be after the receiving order, yet this is merely directory, and a creditor may come in to prove whilst there are assets to distribute so long as no injustice is done to other parties (*p*).

Statement of account.

The affidavit must contain or refer to a statement of account showing particulars of the debt, and must specify the vouchers, if any, which must be produced if called for by the official receiver or trustee (*q*). A bill of exchange, promissory note, or other

Production of security.

(*h*) *Ex parte Arden, Re Arden* (1884), 14 Q. B. D. 121. See, as to amendment pending an appeal against admission of proof, *Re Clark, Ex parte Buenos Ayres and Pacific Railway Co.*, [1901] 1 K. B. 655. See also *Re Morter, Ex parte Nichols* (1897), 76 L. T. 532, affirmed 45 W. R. 593 (over-valuation). Where the creditor was guilty of undue delay amendment was refused (*Re Tricks, Ex parte Charles* (1885), 3 Morr. 15), and where before the amendment is asked for the trustee has altered his position relying on the proof for the whole debt, amendment may be refused (*Re Safety Explosives, Ltd.*, [1904] 1 Ch. 226).

(*i*) Bankruptcy Act, 1883 (46 & 47 Vict. c. 52), Sched. II., r. 14.

(*k*) Under *ibid.*, Sched. II., r. 12.

(*l*) *Ibid.*, Sched. II., r. 15.

(*m*) *Ibid.*, Sched. II., r. 2. The affidavit should be according to the Bankruptcy Rules, Appendix, Forms, No. 72, with such variations as circumstances may require (r. 219). See r. 220 and Form No. 73 as to one claim by the debtor, or his foreman, or some other person for wages on behalf of several workmen. The assignee of a proved debt must get his proof substituted for that of the assignor (*Re Iliff* (1902), 51 W. R. 80). As to punishment for a false claim, or for the bankrupt's omission to inform the trustee of it, see Debtors Act, 1869 (32 & 33 Vict. c. 62), s. 14 and s. 11 (7). See pp. 347, 351, *post*. As to proof by secured creditors, see pp. 226 *et seq.*, *ante*.

(*n*) Bankruptcy Act, 1883 (46 & 47 Vict. c. 52), Sched. II., r. 3. See, as to person proving where an estate is being administered in the Chancery Division, *Ex parte Hare, Re England* (1875), 10 Ch. App. 218.

(*o*) Bankruptcy Act, 1883 (46 & 47 Vict. c. 52), Sched. II., r. 1.

(*p*) *Re Taylor* (1860), 2 De G. F. & J. 625; *Re McMurdo*, [1902] 2 Ch. 684, *ver* VAUGHAN WILLIAMS, L.J., at p. 700.

(*q*) Bankruptcy Act, 1883 (46 & 47 Vict. c. 52), Sched. II., r. 4.

SUB-SECT. 5. Mode of Proof in General.

negotiable instrument or security on which the debtor is liable, and in respect of which a creditor seeks to prove, must, subject to any special order of the court, be produced to the official receiver, chairman of meeting, or trustee, as the case may be, before the proof can be admitted either for dividend or voting purposes (*r*). The proof must state whether the creditor is a secured creditor or not (*s*).

Procedure on proof.

381. If the proof is intended to be used at the first meeting of the creditors it must be lodged with the official receiver not later than the time mentioned for the purpose in the notice convening the meeting, which must be not later than twelve o'clock of the day before the meeting, nor earlier than twelve o'clock of the preceding day (*t*). A proof may be sworn before the official receiver (*a*), an assistant official receiver, or any clerk of the official receiver who has written authority from the court or the Board of Trade in that behalf (*b*), or before the trustee (*c*). In the absence of a special order, the cost of proving his debt must be borne by the creditor himself (*d*). A creditor who has lodged his proof may before the first meeting and at all reasonable times examine the proofs of other creditors (*e*). All trade discounts must be deducted in a proof, but a creditor need not deduct a discount agreed to be allowed for payment in cash when it does not exceed 5 per cent. on the net amount of the claim (*f*).

Proof by corporations, lunatics, infants etc.

382. Proof may be made for a corporation by one of its officers authorised under seal, for a firm by one of its members, for a lunatic by his committee or *curator bonis* (*g*), for a person of weak intellect by someone competent and allowed by the court to prove (*h*), for a company in liquidation by the liquidator in the name of the

(*r*) Bankruptcy Rules, r. 221.

(*s*) Bankruptcy Act, 1883 (46 & 47 Vict. c. 52), Sched. II., r. 5.

(*t*) Bankruptcy Rules, r. 222. In the case of an adjourned meeting a proof must be lodged twenty-four hours before the time of meeting (r. 222 A).

(*a*) Bankruptcy Act, 1883 (46 & 47 Vict. c. 52), s. 68 (2).

(*b*) Bankruptcy Rules, r. 219 A.

(*c*) Bankruptcy Act, 1883 (46 & 47 Vict. c. 52), Sched. II., r. 26. By s. 135, and Bankruptcy Act, 1890 (53 & 54 Vict. c. 71), s. 24, affidavits to be used in a bankruptcy court may be sworn before a person authorised to administer oaths in the High Court or the Chancery Court of Lancaster, or a bankruptcy registrar, or any officer of a bankruptcy court authorised in writing by the judge, or in England and Wales by a justice of the peace for the county or place where they are sworn, in Scotland or Ireland before a judge ordinary, magistrate, or justice of the peace, outside Great Britain and Ireland before a magistrate, justice of the peace, or other person qualified to administer oaths in the place where the deponent resides, he being testified to be such magistrate, justice, or so qualified by a British minister or consul, or by a notary public. If, however, an affidavit is sworn before a British consul or vice-consul, no notarial certificate is necessary (*Re Magee, Ex parte Magee* (1885), 15 Q. B. D. 332).

(*d*) Bankruptcy Act, 1883 (46 & 47 Vict. c. 52), Sched. II., r. 6.

(*e*) *Ibid.*, Sched. II., r. 7.

(*f*) *Ibid.*, Sched. II., r. 8. A trade discount which the creditor has in fact allowed, though without agreement, is included in the above (*Chambers & Co.* v. *Gunstone* (1897), 76 L. T. 780).

(*g*) Bankruptcy Act, 1883 (46 & 47 Vict. c. 52), s. 148. As to lunatics, see *Ex parte Wood, Re Wright* (1879), 10 Ch. D. 554; *Re R. S. A.*, [1901] 2 K. B. 32.

(*h*) *Ex parte Clarke, Re Waugh* (1826), 2 Russ. 575; *Ex parte Oxtoby* (1847), De G. 453.

SUB-SECT. 5. Mode of Proof in General.

company (*i*), for an infant by his guardian (*k*), or possibly by the infant himself (*l*).

Proof in respect of distinct contracts.

383. If a debtor at the date of the receiving order was liable in respect of distinct contracts, which, if written, may be contained in one instrument or more (*m*), as a member of two or more distinct firms, or as a sole contractor and also as a member of a firm, proof may be made in respect of the contracts against the estates respectively liable on them, if there are, in fact, distinct estates (*n*), though the firms are in whole or in part composed of the same individuals, or the sole contractor is also one of the joint contractors (*o*).

Proof against firm and also against partner.

The estate of a firm may be liable where all the partners have contracted, though not in their partnership name (*p*), and though the liability contracted was not for partnership purposes (*q*). Where trust money intrusted to a firm for investment has been made away with by them, proof may be allowed against the estate of the firm on their contract to invest or restore, and against that of one partner, who was trustee, on his contract to perform his trust (*r*). The rule under consideration does not apply to a proof for the injury caused by a disclaimer of a lease, but is confined to proofs which may be made in pursuance of the provision specifically relating to proof of debts (*s*).

Periodical payments.

384. A person entitled to rent or any other payment, which falls due at stated periods, may prove for a proportionate part thereof up to the date of the receiving order, as if the payment grew due from day to day (*t*).

Interest.

385. Proof may be made for interest up to 4 per cent. per annum to the date of the receiving order on any provable debt or sum certain payable at a certain time (*a*) or otherwise, upon which interest is not reserved or agreed for, and which is overdue at the date of the receiving order, from the due date of payment, if the debt or sum is payable at a certain time by virtue of a written instrument (*b*), and if payable otherwise, then from the time when a written demand has been made, giving the debtor notice that interest will be claimed

(*i*) *Ex parte Taylor, Re Pooley* (1877), 36 L. T. 679.

(*k*) *Ex parte Belton* (1744), 1 Atk. 251.

(*l*) See *Ex parte Brocklebank, Re Brocklebank* (1877), 6 Ch. D. 358.

(*m*) *Ex parte Honey, Re Jeffery* (1871), 7 Ch. App. 178 (joint and several promissory note).

(*n*) *Banco de Portugal* v. *Waddell* (1880), 5 App. Cas. 161. It is not sufficient that the same estate is being administered partly here and partly abroad (*ibid.*). See further *Re Somes, Ex parte De Lemos* (1896), 3 Mans. 131.

(*o*) Bankruptcy Act, 1883 (46 & 47 Vict. c. 52), Sched. II., r. 18; *Ex parte Honey, supra.*

(*p*) *Ex parte Stone, Re Welch* (1873), 8 Ch. App. 914.

(*q*) *Re Laine and Longman, Ex parte Berner* (1887), 56 L. J. (Q. B.) 153.

(*r*) *Re Parker, Ex parte Sheppard* (1887), 19 Q. B. D. 84. See also *Re Lake, Ex parte Howe Trustees*, [1903] 1 K. B. 439.

(*s*) Bankruptcy Act, 1883 (46 & 47 Vict. c. 52), s. 37. See *Ex parte Corbett, Re Shand* (1880), 14 Ch. D. 122.

(*t*) Bankruptcy Act, 1883 (46 & 47 Vict. c. 52), Sched. II., r. 19.

(*a*) See, as to this, *London, Chatham, and Dover Rail. Co.* v. *South-Eastern Rail. Co.*, [1893] A. C. 429, at pp. 435, 436; and as to when interest is payable, *Johnson* v. *R.*, [1904] A. C. 822.

(*b*) This would include the case of a surety for the debtor on a promissory note who has duly paid the same (*Ex parte Bishop, Re Fox, Walker & Co.* (1880), 15 Ch. D. 400, 421; *Re Evans, Ex parte Davies* (1897), 4 Mans. 114).

SUB-SECT. 5. Mode of Proof in General.

from the date thereof until payment (*c*). A covenant to pay a debt and interest is merged in a judgment when obtained, and thereafter the interest will be 4 per cent. per annum (*d*).

Where a debt proved includes interest, or any pecuniary consideration in lieu of interest (*e*), the interest for the purpose of dividends, though not of proof (*f*), must be calculated at a rate not exceeding 5 per cent. per annum, without prejudice to the creditor's right to receive any higher interest to which he may be entitled when all the proved debts have been paid in full (*g*).

Debts payable at future time.

386. A creditor may prove for a debt not payable at the date of the act of bankruptcy and receive dividends thereon equally with the other creditors, deducting only thereout a rebate of interest at 5 per cent. per annum from the date of the declaration of dividend to the time when the debt would become payable according to the contract (*h*). If interest is payable on the debt, then the creditor first proves the debt as a present debt, deducting the rebate of interest as above mentioned; he then values the liability to pay interest and proves for that value, and will be entitled to a dividend on it without rebate (*i*).

Admission and rejection of proofs.

387. Before the appointment of a trustee the official receiver has all a trustee's power as to examining, admitting, or rejecting proofs, and his decisions or acts may be appealed from as those of a trustee (*k*). In no case, however, is he personally liable for costs on an appeal from his rejection of a proof (*l*). On the appointment of a trustee the official receiver sends to him a list of the proofs received (*m*), and, if no trustee is appointed, he as trustee sends to the registrar on the approval of a composition or scheme, or after the declaration of a final dividend in bankruptcy, a list of all proofs tendered, showing how they were dealt with (*n*).

(*c*) Bankruptcy Act, 1883 (46 & 47 Vict. c. 52), Sched. II., r. 20.

(*d*) *Economic Life Assurance Society* v. *Usborne*, [1902] A. C. 147.

(*e*) What is principal, and what interest, or consideration in lieu of it, will depend on the real effect of the contract. See *Ex parte Bath, Re Phillips* (1883), 27 Ch. D. 509; *Re Holland, Ex parte Parker* (1894), 71 L. T. 435.

(*f*) Bankruptcy Act, 1890 (53 & 54 Vict. c. 71), s. 23; *Re Herbert, Ex parte Jones* (1892), 9 Morr. 253; *Re Nepean, Ex parte Ramchund*, [1903] 1 K. B. 794 (where in a scheme "provable" debts included debts bearing interest higher than 5 per cent.).

(*g*) Bankruptcy Act, 1890 (53 & 54 Vict. c. 71), s. 23. The section is not retrospective (*Re Athlumney, Ex parte Wilson*, [1898] 2 Q. B. 547). The right of a creditor to allocate his security to interest is not affected by this provision (*Re Fox & Jacobs, Ex parte Discount Banking Co.* (1893), 10 Morr. 295). As to proof for interest after receiving order where debt payable *in futuro*, see note (*i*), *infra*; as to payment of interest in case of surplus, see Bankruptcy Act, 1883 (46 & 47 Vict. c. 52), s. 40 (5). The security of a secured creditor cannot be applied to such interest so as to increase the amount of the proof (*Re Bonacina, Ex parte Discount Banking Co.* (1894), 1 Mans. 59; *Quartermaine's Case*, [1892] 1 Ch. 639). As to cutting down the amount of a money-lender's proof where the sum charged for interest or otherwise is excessive, and the transaction harsh and unconscionable, or otherwise such that a court of equity would give relief, see Money-lenders Act, 1900 (63 & 64 Vict. c. 51), p. 211, *ante*. See title MONEY AND MONEY-LENDERS.

(*h*) Bankruptcy Act, 1883 (46 & 47 Vict. c. 52), Sched. II., r. 21.

(*i*) *Re Browne & Wingrove, Ex parte Ador*, [1891] 2 Q. B. 574.

(*k*) Bankruptcy Act, 1883 (46 & 47 Vict. c. 52), Sched. II., r. 27.

(*l*) Bankruptcy Rules, r. 231.

(*m*) *Ibid.*, r. 223.

(*n*) *Ibid.*, r. 224.

SUB-SECT. 5. Mode of Proof in General.

The trustee must examine every proof and the grounds of the debt, even though the proof be based on a judgment, a covenant, or an account stated (*o*), and in writing admit or reject it in whole or in part. In case of rejection the grounds thereof must be stated in writing to the creditor (*p*), and if they are unreasonable or vexatious the trustee may be liable to the creditor for the costs of an appeal from the rejection (*q*). For the purpose of his duties in relation to proofs he may administer oaths and take affidavits (*r*).

Withdrawal of proof and tender of another.

A creditor may withdraw his proof and tender another before it has been adjudicated on, or if the only objection to it is one of form, but not if it is rejected on the merits (*s*).

Time for adjudication on proofs.

388. A trustee, other than the official receiver, must within twenty-eight days deal with proofs received by him not already dealt with by the official receiver, but if he has given notice of intention to declare a dividend, he must deal with any proof thereafter received within seven days from the latest date for lodging proofs mentioned in the notice (*t*). A notice to a creditor of a dividend is sufficient notice of admission of proof (*a*).

Expunging of proofs.

389. A proof may be expunged by the court or the amount reduced, after proper notice to the creditor (*b*), on the application of the trustee, if he thinks that it has been improperly admitted (*c*), or

(*o*) *Re Van Laun, Ex parte Chatterton*, [1907] 2 K. B. 23, affirming, [1907] 1 K. B. 155, and cases there cited. Similarly in the winding-up of a company a liquidator in examining a proof is entitled also to examine a set-off to such proof (*Re National Wholemeal Bread and Biscuit Co.*, [1892] 2 Ch. 457).

(*p*) Bankruptcy Act, 1883 (46 & 47 Vict. c. 52), Sched. II., r. 22.

(*q*) *Ex parte Brown, Re Smith* (1886), 17 Q. B. D. 488.

(*r*) Bankruptcy Act, 1883 (46 & 47 Vict. c. 52), Sched. II., r. 26.

(*s*) *Re Deerhurst, Ex parte Seaton* (1891), 8 Morr. 258; *Re Attree, Ex parte Ward*, [1907] 2 K. B. 868. The rejection will hold good in favour of the debtor if the bankruptcy be annulled (*Brandon* v. *McHenry*, [1891] 1 Q. B. 538), or if a composition or scheme be approved (*Seaton* v. *Lord Deerhurst*, [1895] 1 Q. B. 853). See *Re Rowe, Ex parte Derenburg & Co.*, [1904] 2 K. B. 483, where a creditor withdrew a proof in which he had given credit for money paid not on account of the debt or the debtor. In the case of evident mistake the amendment of a proof may be allowed (*Ex parte Schofield, Re Firth* (1879), 12 Ch. D. 337.

(*t*) Bankruptcy Rules, r. 228. The Court may extend the time. The time within which the official receiver as trustee should deal with proofs is within fourteen days from the latest day for lodging proofs specified in a notice of intention to declare a dividend (rr. 227, 227 A).

(*a*) *Ibid.*, r. 229. Every trustee other than the official receiver must on the first day of the month send to the registrar a certified list of all proofs received by him from the official receiver or tendered during the preceding month, distinguishing those admitted, or rejected, or standing over for further consideration, of which those admitted or rejected are to be filed (r. 225). And when a dividend is declared he must send to the Board of Trade a list of the proofs so filed (see *ibid.*, Appendix, Forms, Nos. 122 a, 122 b), which, if in a county court, must be examined and certified by the registrar on payment of the prescribed fee. In the High Court the trustee must, if required by the Board of Trade, send office copies of all lists of proofs filed by him up to the declaration of the dividend (r. 225 A).

(*b*) As to notice to creditors in Scotland and abroad, see *Re Calvert, Ex parte Calvert* (No. 2) (1899), 6 Mans. 216.

(*c*) Bankruptcy Act, 1883 (46 & 47 Vict. c. 52), Sched. II., r. 23. An application to expunge may be made at any time (*Ex parte Harper, Re Tait* (1882), 21 Ch. D. 537). As to dividends received, see *ibid.*, and *Ex parte Ogle, Ex parte Smith, Re Pilling* (1873), 8 Ch. App. 716. See also *Ex parte Soper, Re*

SUB-SECT. 5. Mode of Proof in General.

on the application of a creditor, if the trustee declines to interfere in the matter (*d*), or in the case of a composition or scheme, on the application of the debtor (*e*).

The power to expunge may be exercised though the trustee has not dealt with the proof within the time prescribed by the rules (*f*). And the proof of a joint stock company, which after proof is dissolved, should not be expunged, but the dividends after dissolution devolve on the Crown (*g*).

Appeals as to proofs.

390. A creditor dissatisfied with the decision of the official receiver or trustee, as the case may be, as to his proof, may appeal, by notice to be served within twenty-one days from the date of the decision (*h*), to the court, which may vary or reverse the decision (*i*).

Within three days after receipt of notice of appeal against a decision rejecting a proof the proof must be filed, with a memorandum of its disallowance, by the official receiver or trustee, to whom, unless it be wholly disallowed, it will be returned when the appeal has been disposed of (*k*).

A creditor residing abroad will not, save in an extreme case, be ordered to give security for the costs of an appeal by him (*l*).

SECT. 12.—*Distribution of Property.*

SUB-SECT. 1.—*In General.*

General order of payment.

391. The statutory priorities of creditors entitled to share in the distribution of a bankrupt's assets have been already dealt with (*m*). Subject to these priorities and to certain enactments postponing the claims of certain creditors (*m*), all debts proved in

Salter (1836), 2 Mont. & A. 55; *Ex parte Alexander, Re Sanderson* (1856), 8 De G. M. & G. 849; *Ex parte Wilson, Ex parte Wyman* (1841), 1 Mont. D. & De G. 586.

(*d*) Bankruptcy Act, 1883 (46 & 47 Vict. c. 52), Sched. II., r. 25. But the application must not be made by him on the debtor's behalf (*Re Tallerman, Ex parte Rooney* (1888), 5 Morr. 119). See *Ex parte Merriman, Re Stenson* (1883), 25 Ch. D. 144.

(*e*) Bankruptcy Act, 1883 (46 & 47 Vict. c. 52), Sched. II., r. 25; *Re Calvert, Ex parte Calvert* (No. 1) (1899), 6 Mans. 209; *Re Bluck, Ex parte Bluck* (1887), 4 Morr. 273, where a scheme was rejected, and the debtor adjudicated bankrupt, by reason of the creditor's vote. Where the debt is not disputed at the hearing of the petition, see *Ex parte Hooper, Re Hooper* (1876), 45 L. J. (BCY.) 83. See generally *Ex parte Bacon, Re Bond* (1880), 17 Ch. D. 447.

(*f*) *Re Sissling, Ex parte Fenton* (1885), 2 Morr. 289; *Re Voght, Ex parte Spamer* (1886), 3 Morr. 164, where the creditor's appeal from rejection was turned into a motion to expunge. The provision in the Bankruptcy Rules, r. 228 (p. 234, *ante*), as to time for admission or rejection of proofs by the trustees, mainly applies to allegations of fact in a proof, but does not fetter the trustee as to valuation of a contingent liability (*Re Dodds, Ex parte Vaughan's Executors* (1890), 25 Q. B. D. 529).

(*g*) *Re Higginson & Dean, Ex parte A.-G.*, [1899] 1 Q. B. 325.

(*h*) Bankruptcy Rules, r. 230, and *Re Gillespie, Ex parte Morrison* (1884), 14 Q. B. D. 385. See pp. 305, 306, *post*. The appeal must be brought within seven days when brought after the latest day for lodging proofs mentioned in a notice to declare a dividend (Bankruptcy Rules, r. 232 (2)).

(*i*) Bankruptcy Act, 1883 (46 & 47 Vict. c. 52), Sched. II., r. 24.

(*k*) Bankruptcy Rules, r. 226.

(*l*) *Re Semenza, Ex parte Trustee*, [1894] 1 Q. B. 15; *Re Pilling, Ex parte Chapman* (1906), 94 L. T. 682.

(*m*) See pp. 222 *et seq.*, *ante*.

SUB-SECT. 1. In General.

the bankruptcy are to be paid *pari passu* (*n*). To entitle a creditor to share in the distribution, he must have proved his debt, and if he is a secured creditor he must have complied with the rules relating to secured creditors (*o*).

Dividends.

392. It is the duty of the trustee, subject to the retention of such sums as may be necessary for the costs of administration or otherwise, to declare and distribute dividends amongst the creditors who have proved their debts. The first dividends should be declared and distributed within four months after the conclusion of the first meeting of creditors (*p*), unless the trustee satisfies the committee of inspection that there is sufficient reason for postponing the declaration to a later date. The declaration and distribution of subsequent dividends must, in the absence of sufficient reason to the contrary, take place at intervals of not more than six months (*q*).

Notices.

Not more than two months before declaring a dividend the trustee must give notice of his intention to do so to the Board of Trade and to such of the creditors of whom he has notice as have not proved. The notice must state the latest date, not less than fourteen days from the date of the notice, up to which proofs must be lodged, and the notice must be gazetted by the Board of Trade (*r*). A time is limited within which a creditor, who after the notice appeals against the decision of the trustee rejecting his proof, must prosecute his appeal (*s*).

Declaration of dividend.

Immediately after the expiration of the time above mentioned the trustee is to declare the dividend of which notice has been given, giving notice thereof to the Board of Trade, so that it may be gazetted, and to each creditor whose proof has been admitted, accompanied by a statement showing the position of the estate (*t*).

(*n*) Bankruptcy Act, 1883 (46 & 47 Vict. c. 52), s. 40 (4).

(*o*) See p. 226, *ante*.

(*p*) In summary cases within six months (Bankruptcy Rules, r. 273 (12)).

(*q*) Bankruptcy Act, 1883 (46 & 47 Vict. c. 52), s. 58 (1)—(3).

(*r*) *Ibid.*, s. 58 (4); Bankruptcy Rules, r. 232 (1). "Gazetted" means published in the *London Gazette*. A creditor who fails to prove his debt within the specified time will not necessarily be debarred from dividend (*Re Shepherd & Leech, Ex parte Whitehaven Mutual Insurance Society* (1887), 4 Morr. 130).

(*s*) Where a creditor, after the latest date for lodging proofs mentioned in the notice, appeals against the rejection of his proof by the official receiver or trustee, his appeal must, subject to the power of the court to extend the time in special cases, be commenced and notice given to the official receiver or trustee within seven days from the rejection of the proof, and in that case provision must be made by the official receiver or trustee for the dividend on the proof, as well as for the probable costs of the appeal in case the proof should be admitted. Where no appeal has been commenced within the time above prescribed, the trustee will exclude all rejected proofs from participation in dividend (Bankruptcy Rules, r. 232 (2); see p. 235, *ante*).

(*t*) Bankruptcy Act, 1883 (46 & 47 Vict. c. 52), s. 58 (5), Bankruptcy Rules, r. 232 (3), (4), and Appendix, Forms Nos. 122, 123, 126, and 174 (7). If the trustee and committee of inspection think it necessary to postpone the declaration of dividend beyond the above period of two months, the trustee gives a fresh notice to the Board of Trade of his intention to declare a dividend, so that it may be gazetted, but he need not give a fresh notice to the creditors mentioned in the statement of affairs who have not proved their debts (r. 232 (5)).

SUB-SECT. 1. In General.

Mode of payment.

The payment of dividends will, except where an account at a local bank has been authorised, be made by cheques on the Bank of England, or money orders, which will be prepared by the Board of Trade on the application of the trustee, certified by the registrar of the county court if the proceedings are there, or by the trustee if the proceedings are in the High Court, and in the latter case accompanied by office copies of the lists of proofs filed (*a*).

At his own request and risk, a creditor may have his dividend transmitted to him by post (*b*).

Provision for provable debts.

393. In the calculation and distribution of a dividend the trustee must provide for provable debts which appear, from the bankrupt's statements or otherwise, to be due to persons who reside so far from the place where the trustee is acting that in the ordinary course of communication they have not had time to tender their proofs or to establish them if disputed. He must also provide for provable debts the subject of claims not yet determined, as well as for disputed proofs or claims, and for the necessary expenses of the administration of the estate or otherwise. Subject to his making provision as aforesaid, he must distribute as dividend all money in hand (*c*).

Proof after declaration of dividend.

394. So long as there are assets to distribute, a creditor may come and prove (*d*); and so where a creditor has not proved his debt before the declaration of a dividend he has a right to be paid out of any money for the time being in the trustee's hands any dividend or dividends which he may have failed to receive before that money is applied to the payment of any future dividend or dividends, but he must not disturb the distribution of any dividend declared before proof of his debt by reason that he has not participated therein (*e*).

Final dividend.

395. A final dividend must be declared by the trustee when he has realised all the property of the bankrupt, or so much thereof as, in the joint opinion of himself and the committee of inspection, can

(*a*) Board of Trade Regulations ; and see Bankruptcy Rules, r. 225 A, Appendix, Forms, Nos. 122 a, 122 b. The total amount of dividend should be charged in the estate cash-book in one sum. If the dividend has been paid by cheques on the Bankruptcy Estates Account, the trustee at the end of six months from the date of issue, or from the application for his release if earlier, should return any cheques remaining in hand to the Assistant Secretary, Finance Department, Board of Trade. If the dividend is paid through a local bank, the trustee on its declaration should forward to the Inspector-General in Bankruptcy a certified list of proofs in the prescribed form (*ibid.*, Appendix, Forms, No. 122 b), with an office copy of list of proofs filed, if the proceedings are in the High Court, and at the end of six months should forward to the Inspector-General vouchers for dividends paid and a list of those remaining unpaid (Board of Trade Regulations).

(*b*) Bankruptcy Rules, r. 234.

(*c*) Bankruptcy Act, 1883 (46 & 47 Vict. c. 52), s. 60. The trustee is not bound to make provision for the possible claim of a secured creditor who has not realised and valued his security (*Ex parte Good, Re Lee* (1880), 14 Ch. D. 82). Compare *Ex parte Snell, Re Cole* (1880), 42 L. T. 62, where there had been an agreement between the trustee and the secured creditor that if, on realisation of the security, there should be a deficiency, the creditor should have a right of proof.

(*d*) *Ex parte Day, Re Fenton* (1831), Mont. 212 ; *Ex parte Boddam, Re Taylor* (1860), 2 De G. F. & J. 625 ; *Re McMurdo*, [1902] 2 Ch. 684.

(*e*) Bankruptcy Act, 1883 (46 & 47 Vict. c. 52), s. 61.

SUB-SECT. 1. In General.

be realised without needlessly protracting the trusteeship. Before, however, he declares such dividend, notice must be given to those persons whose claims as creditors have been notified to him, but not established to his satisfaction, that if they do not establish their claims to the satisfaction of the court within a specified time, a final dividend will be declared without regard to such claims (*f*).

Joint and separate estates.

396. Where one partner of a firm is adjudged bankrupt, a creditor to whom the bankrupt is indebted jointly with the other partners or any of them cannot receive a dividend from the bankrupt's separate property until all his separate creditors have been paid in full (*g*). Where joint and separate properties are being administered, dividends in respect of them are, subject to any order of the court to the contrary on the application of a person interested, to be declared together, the expenses of and incident to the dividends being fairly apportioned by the trustee between the joint and separate properties, regard being had to the work done for, and the benefit received by, each property (*h*).

Enforcement of payment of dividend.

397. A creditor cannot sue the trustee for a dividend, his remedy being to apply to the court, which may, if it thinks fit, order the trustee to pay it, and also to pay out of his own pocket interest for the time during which the dividend has been wrongly withheld, together with the costs of the application (*i*). The dividend is not a debt due by the trustee, and so cannot be attached by garnishee process (*k*).

Assignee of proved debt.

The assignee of a creditor whose debt has been admitted cannot compel the trustee to pay him the dividend, his remedy being to apply to the Court to give leave to the trustee to admit a proof by him in substitution for that of the original creditor (*l*). And it

(*f*) Bankruptcy Act, 1883 (46 & 47 Vict. c. 52), s. 62; Bankruptcy Rules, Appendix, Forms, No. 124.

(*g*) Bankruptcy Act, 1883 (46 & 47 Vict. c. 52), s. 59 (1). Such creditor may, however, prove his debt for the purpose of voting at a meeting of creditors, and may vote at it (*ibid.*, Sched. I., r. 13).

(*h*) *Ibid.*, s. 59 (2). See also p. 232, *ante;* Bankruptcy Rules, rr. 265—270; r. 127 (apportionment of costs up to receiving order by official receiver between joint and separate estates); r. 128 (the like apportionment by the official receiver of costs incurred up to the appointment of the trustee where the joint or a separate estate has not sufficient assets to defray its own costs, or by the trustee with the consent of the committee of inspection, or the court, of costs incurred after his appointment); r. 269 (transfer of surplus where two or more members of a partnership constitute a separate firm).

(*i*) Bankruptcy Act, 1883 (46 & 47 Vict. c. 52), s. 63. This remedy lies against the trustee even after his release (*Re Prager, Ex parte Société Cockrill* (1876), 3 Ch. D. 115). Compare *Ex parte Carter, Re Ware* (1878), 8 Ch. D. 731; *Ex parte Barnard, Re Gill* (1882), 46 L. T. 824; *Re Harris, Ex parte Hasluck*, [1899] 2 Q. B. 97. So also no action lies to enforce a composition (Bankruptcy Rules, r. 211). A trustee is not personally liable for money paid by him *bonâ fide* under a mistake of law (*Ex parte Ogle, Ex parte Smith, Re Pilling* (1873), 8 Ch. App. 711).

On the other hand, it would appear that the trustee cannot sue a creditor for a return of overpaid dividend (*Figg* v. *Hegarty* (1890), 34 Sol. Jo. 214).

(*k*) *Prout* v. *Gregory* (1889), 24 Q. B. D. 281; *Spence* v. *Coleman*, [1901] 2 K. B. 199.

(*l*) *Re Frost, Ex parte Official Receiver*, [1899] 2 Q. B. 50; *Re Iliff* (1902), 51 W. R. 80.

seems that the trustee may retain a dividend, payable to a creditor who has assigned it, as security for costs ordered to be paid in the bankruptcy proceedings by the creditor to the trustee (*m*).

Charging order for costs.

398. Where a creditor's proof in respect of a judgment obtained against the bankrupt is admitted, the solicitor who acted for the creditor in the action cannot obtain from the court in bankruptcy a charging order on the dividend for his costs (*n*).

Production of negotiable instrument.

399. Where proof has been made on a bill of exchange or other negotiable instrument or security, the instrument must as a rule be produced to the trustee before payment of dividend thereon (*o*).

Payment under mistake.

400. Where money paid to the trustee under a mistake of law has been paid away by him in dividends, the court will order him to repay it out of moneys which may afterwards come to his hands available for dividends (*p*).

Division in specie.

401. The trustee may, with the permission of the committee of inspection, divide in its existing form among the creditors property which, from its peculiar nature or other special circumstances, cannot be readily or advantageously sold (*q*).

Bankrupt's right to surplus.

402. Any surplus remaining after payment in full of all the debts, with such interest as is payable on them, and the costs, charges, and expenses of the bankruptcy, belongs to the bankrupt (*r*). He cannot, however, as owner of a possible surplus, interfere in the administration of the estate (*s*), though he may execute an assignment or mortgage of it which will hold good against a trustee in a second bankruptcy (*t*).

SUB-SECT. 2.—*Unclaimed Funds or Dividends.*

Disposal of unclaimed dividends.

403. Unclaimed funds or dividends must be accounted for, not only by trustees appointed under the existing Bankruptcy Acts, but also by those who have acted under certain earlier Acts now repealed (*a*).

(*m*) *Re Mayne, Ex parte Official Receiver*, [1907] 2 K. B. 899.

(*n*) *Re Cook, Ex parte Cripps*, [1899] 1 Q. B. 863. See also and compare, as to charging orders in bankruptcy, *Re Suffield and Watts, Ex parte Brown* (1888), 20 Q. B. D. 693; *Re Wood, Ex parte Fanshawe*, [1897] 1 Q. B. 314; *Re Deakin, Ex parte Daniell*, [1900] 2 Q. B. 489.

(*o*) This, however, is subject to the Bills of Exchange Act, 1882 (45 & 46 Vict. c. 61), s. 70 (see title BILLS OF EXCHANGE ETC., p. 515, *post*), and to the power of the court on special grounds to dispense with production (Bankruptcy Rules, r. 233).

(*p*) *Ex parte Simmonds, Re Carnac* (1885), 16 Q. B. D. 308.

(*q*) Bankruptcy Act, 1883 (46 & 47 Vict c. 52), s. 57 (9).

(*r*) *Ibid.*, s. 65.

(*s*) *Ex parte Sheffield, Re Austin* (1879), 10 Ch. D. 434; *Re Leadbitter* (1878), 10 Ch. D. 388.

(*t*) *Bird* v. *Philpott*, [1900] 1 Ch. 822; *Re Adie, Ex parte Rushforth* (1901), 84 L. T. 508.

See also *Re Evelyn, Ex parte General Public Works and Assets Co.*, [1894] 2 Q. B. 302, where an unsuccessful attempt was made to restrain a sale under such a mortgage, which sale was by its conditions subject to the rights of the creditors.

(*a*) Bankruptcy Act, 1883 (46 & 47 Vict. c. 52), s. 162.

SUB-SECT. 2. **Unclaimed Funds or Dividends.**

Under Act of 1883.

With regard to the former, where a dividend remains under the control of a trustee, whether in a bankruptcy, composition or scheme, unclaimed for more than six months, or where after the declaration of a final dividend he has in his hands or under his control unclaimed or undistributed moneys belonging to the estate, he must forthwith pay the same into the Bankruptcy Estates Account at the Bank of England (*b*). For this purpose he must first apply to the Board of Trade for a paying-in order, which will be an authority to the Bank of England to receive the payment (*c*).

Under repealed Acts.

Where after August 25, 1883 (*d*), any unclaimed or undistributed funds or dividends in the hands or under the control of any trustee or other person empowered to collect, receive or distribute any funds or dividends under any of the repealed Acts above referred to (*e*) have remained unclaimed or undistributed for six months after the same have become claimable or distributable, or in any case for two years after their receipt by him, such trustee or other person must forthwith pay them into the Bankruptcy Estates Account in the manner above mentioned (*f*).

Order by Board of Trade for accounts etc.

The Board of Trade may at any time order any such trustee under the Act of 1883 to submit an account, verified by affidavit, of his receipts and payments, and may direct and enforce an audit of the accounts, and payment as above of any such unclaimed or undistributed moneys (*g*).

Other remedies.

The above-mentioned statutory enactments do not, save as expressly declared in them, deprive any person of any larger or

(*b*) Bankruptcy Act, 1883 (46 & 47 Vict. c. 52), s. 162 (1).

(*c*) Bankruptcy Rules, r. 345.

(*d*) The date of the passing of the Bankruptcy Act, 1883 (46 & 47 Vict. c. 52).

(*e*) These Acts are 7 & 8 Vict. c. 70 (arrangements between debtors and creditors); 12 & 13 Vict. c. 106 (Bankruptcy Law Consolidation Act, 1849); 24 & 25 Vict. c. 134 (Bankruptcy Act, 1861); 32 & 33 Vict. c. 71 (Bankruptcy Act, 1869).

As to bankruptcies still pending under these Acts, see p. 324, *post*.

(*f*) Bankruptcy Act, 1883 (46 & 47 Vict. c. 52), s. 162 (2) (a). The Board of Trade will give a receipt for money so paid, which will be an effectual discharge (*ibid.*). The Board may at any time call on such trustee or other person for an account verified by affidavit of his receipts and payments, and cause the same to be audited (*ibid.*, s. 162 (2) (b)), and that without proving that he has had since the passing of the Bankruptcy Act, 1883, any unclaimed or undistributed funds or dividends (*Re Cornish, Ex parte Board of Trade*, [1896] 1 Q. B. 99). The provisions of s. 8 of the Trustee Act, 1888 (51 & 52 Vict. c. 59), enabling trustees to plead the Statute of Limitations, do not apply to such a trustee or other person (*Re Cornish, Ex parte Board of Trade, supra*).

The Board of Trade, with the concurrence of the Treasury, may appoint a person to collect and get in all such undistributed funds or dividends, and all bankruptcy courts may at the instance of such person, or of the Board of Trade, exercise all their statutory powers as to the discovery and realisation of a debtor's property, and for this purpose Part I. of the Bankruptcy Act, 1883, will be applicable, with all necessary modifications (Bankruptcy Act, 1883, s. 162 (2) (c)). See further on this section *Re Pearce, Ex parte Board of Trade* (1884), 1 Morr. 56 (money wrongly retained for remuneration); *Re Calderwood, Ex parte Board of Trade* (1889), 6 Morr. 104; *Re Chudley, Ex parte Board of Trade* (1884), 14 Q. B. D. 402 (release after August 25, 1883). See *Re Higginson & Dean, Ex parte A.-G.*, [1899] 1 Q. B. 325 (dividend payable to a dissolved corporation).

(*g*) Bankrupcy Rules. r. 346 A.

other right or remedy to which he may be entitled against such trustee or other person (*h*).

SUB-SECT. 2. Unclaimed Funds or Dividends.

404. A person who claims to be entitled to any moneys paid into the Bankruptcy Estates Account as unclaimed funds or dividends may apply to the Board of Trade, which, if satisfied as to his title, may order payment to him. An appeal, which must be brought within twenty-one days (*i*), lies against the decision of the Board of Trade (*k*).

Payment out to person entitled.

SECT. 13.—*Order of Discharge.*

SUB-SECT. 1.—*Application for the Order.*

405. A bankrupt (*l*) may at any time after his adjudication apply to the court which adjudged him bankrupt for an order discharging him from all debts and liabilities provable in the bankruptcy, called an order of discharge, and the court must appoint a day for hearing the application, which must not be before the public examination has been concluded (*m*).

Bankrupt's right to apply.

406. The application to the court to fix a day for hearing the application for discharge is made to the registrar in his chambers

Application to registrar.

(*h*) Bankruptcy Act, 1883 (46 & 47 Vict. c. 52), s. 162 (3).

(*i*) *Ibid.*, s. 139.

(*k*) *Ibid.*, s. 162 (4). An application must be made in such form and manner as the Board of Trade may from time to time direct, and must, unless the Board dispenses therewith, be supported by affidavit and such further evidence as the Board may require (Bankruptcy Rules, r. 346).

As to an account of receipts and payments under the Deeds of Arrangement Act, 1887 (50 & 51 Vict. c. 57) (even where there are no assets, see *Re Hertage* (1896), 3 Mans. 297), see Bankruptcy Act, 1890 (53 & 54 Vict. c. 71), s. 25 (1).

(*l*) This section deals with applications for discharge by persons adjudicated bankrupts on or after January 1, 1891, when the Bankruptcy Act, 1890 (53 & 54 Vict. c. 71), came into operation. That Act by s. 29 repealed s. 28 of the Bankruptcy Act, 1883 (46 & 47 Vict. c. 52), and by s. 8 altered and extended the provisions of the repealed section. In spite of the repeal of s. 28 of the Bankruptcy Act, 1883, persons adjudicated bankrupts after December 31, 1883, and before January 1, 1891, apply for their discharge under the repealed s. 28 of the Bankruptcy Act, 1883, and not under s. 8 of the Bankruptcy Act, 1890 (Interpretation Act, 1889 (52 & 53 Vict. c. 63); *Re Raison, Ex parte Raison* (1891), 8 Morr. 11). A debtor who has been adjudicated bankrupt, or whose affairs have been liquidated by arrangement under the Bankruptcy Act, 1869 (32 & 33 Vict. c. 71), or any previous Bankruptcy Act, and who has not obtained his discharge, may apply to the court for an order of discharge under the provisions of the Bankruptcy (Discharge and Closure) Act, 1887 (50 & 51 Vict. c. 66), and the Bankruptcy (Discharge and Closure) Rules, 1887. Applications for orders of discharge under the last-mentioned Act and rules and applications for orders of discharge under s. 28 of the Bankruptcy Act, 1883, are now so rare that it appears best to deal here only with applications by persons adjudicated bankrupts on or after January 1, 1891. The application for an order of discharge if made by a bankrupt who has not obtained his discharge under an earlier bankruptcy will be adjourned *sine die*, with liberty to apply, when the applicant has purged himself of his former bankruptcy (*Re Binko* (1885), 1 T. L. R. 239, *per* MURRAY, Reg., at p. 240).

(*m*) Bankruptcy Act, 1890 (53 & 54 Vict. c. 71), s. 8 (1). The form of application to fix a day for the hearing (Bankruptcy Rules, Appendix, Forms, No. 58) assumes that the public examination has been concluded before the application to fix a day. An application to the court to fix the day for hearing an application for an order of discharge, if made before the public examination has been concluded, would be premature, and would not be granted.

SUB-SECT. 1. Application for Order.

or office. The applicant must produce to the registrar a certificate from the official receiver specifying the number of his creditors of whom the official receiver has notice, whether they have proved (*n*) their debts or not. It is the practice to annex the certificate to the application (*o*).

Notices.

407. It is incumbent on the registrar to give to the official receiver and the trustee of the bankrupt's property, if the creditors have appointed one, not less than twenty-eight days before the day appointed for hearing the application, notice of the time and place of hearing (*p*), and the official receiver is required forthwith to send notice thereof to the Board of Trade for insertion in the *London Gazette*. He must also send notice of the day appointed for the hearing to each creditor not less than fourteen days before the day appointed (*q*).

Summary administration.

Where an estate has been ordered to be administered in a summary manner as a small estate, that is to say, an estate the assets of which are estimated to be less in value than £300 (*r*), the certificate of the official receiver is not to include, and the notices are not to be sent to, creditors whose debts do not exceed £2, unless the court otherwise specially directs (*s*).

Official receiver's report.

408. It is the duty of the official receiver to report (*t*) to the court as to the bankrupt's conduct and affairs, including his conduct during the proceedings under his bankruptcy, stating whether there is reason to believe that he has committed any act which constitutes a misdemeanour under the Debtors Act, 1869 (*a*), or any amendment thereof, or under the Bankruptcy Act, 1883 (*b*), or any other misdemeanour connected with his bankruptcy or any felony connected with his bankruptcy (*c*), or which would justify the court in refusing, suspending, or qualifying an order for his discharge (*d*). This report of the official receiver must be filed in the court not

(*n*) Bankruptcy Rules, r. 235 (1). For form of certificate, see *ibid.*, Appendix, Forms, No. 59; for form of application, *ibid.*, No. 58.

(*o*) *Ibid.*, No. 58.

(*p*) Bankruptcy Rules, r. 235 (1).

(*q*) Bankruptcy Act, 1890 (53 & 54 Vict. c. 71), s. 8 (6); Bankruptcy Rules, r. 235 (2). The section says "to each creditor who has proved." The rule, however, is not so limited. The rule requires that the notice should be in the form given in the Bankruptcy Rules, Appendix, Forms, No. 61. The provisions of s. 8 of the Bankruptcy Act, 1890, and s. 29 of the Bankruptcy Act, 1883 (46 & 47 Vict. c. 52), should be printed on the back of the notice.

(*r*) Under Bankruptcy Act, 1883 (46 & 47 Vict. c. 52), s. 121. See p. 294, *post*.

(*s*) Bankruptcy Rules, r. 273 (9).

(*t*) See Bankruptcy Act, 1883 (46 & 47 Vict. c. 52), s. 69 (1), and Bankruptcy Act, 1890 (53 & 54 Vict. c. 71), s. 8 (2).

(*a*) 32 & 33 Vict. c. 62, Part II. See Bankruptcy Act, 1890 (53 & 54 Vict. c. 71), s. 26; and Bankruptcy Act, 1883 (46 & 47 Vict. c. 52), ss. 163—167; and pp. 345 *et seq.*, *post*.

(*b*) 46 & 47 Vict. c. 52, ss. 31, 163—167.

(*c*) Bankruptcy Act, 1890 (53 & 54 Vict. c. 71), s. 8 (2). As to the meaning of the words "connected with his bankruptcy," see note (*a*), p. 247, *post*, and *Re Hedley, Ex parte Board of Trade*, [1895] 1 Q. B. 923.

(*d*) Bankruptcy Act, 1890 (53 & 54 Vict. c. 71), s. 8 (2), (3); Bankruptcy Act, 1883 (46 & 47 Vict. c. 52), ss. 29, 69 (1), and p. 246, *post*.

less than seven days before the time appointed for hearing the application (*e*). SUB-SECT. 1. Application for Order.

If the bankrupt intends to dispute any statement as to his conduct and affairs contained in the official receiver's report, he must give notice in writing to the official receiver, not less than two days before the hearing, specifying the statements (*f*) in the report which he proposes to dispute at the hearing (*g*). Dispute of report by bankrupt.

409. Any creditor, who intends to oppose the discharge on grounds other than those mentioned in the official receiver's report, must give to the official receiver notice of the intended opposition, stating the grounds thereof, not less than two days before the hearing (*h*). Opposition by creditors.

SUB-SECT. 2.—*Hearing of the Application.*

410. The application must be heard in open court (*i*). In the High Court the application may, and, except in cases of special difficulty and importance (*k*), will, be heard by one of the registrars in bankruptcy, whether the application is or is not opposed (*l*). In a county court a registrar (*m*) or deputy registrar (*n*) of a county court having jurisdiction in bankruptcy has power, under the general or special directions of the judge, to hear unopposed applications for discharge. Opposed applications for discharge must in the county court be heard by the judge (*o*). Before whom hearing takes place.

Where the official receiver reports to the court any fact, matter, or circumstance which would under the Bankruptcy Acts, 1883 and 1890, justify the court in refusing an unconditional order of discharge, the application is deemed to be an opposed application (*p*). Opposed applications.

(*e*) Bankruptcy Rules, r. 238. See, as to the effect of "filing," Bankruptcy Rules, r. 12.

(*f*) It is not enough to give a general notice to dispute (*Re Woolf* (1906), 22 T. L. R. 501).

(*g*) Bankruptcy Rules, r. 238 A. But, *semble*, the court is not conclusively bound by the report of the official receiver in the absence of a notice to dispute by the bankrupt (*Re Oswell, Ex parte Board of Trade* (1892), 9 Morr. 202, *per* VAUGHAN WILLIAMS, J., at p. 207).

(*h*) Bankruptcy Rules, r. 238 A.

(*i*) Bankruptcy Act, 1890 (53 & 54 Vict. c. 71), s. 8 (1); Bankruptcy Rules, r. 6 (c).

(*k*) As to adjournment from registrar to judge, see *ibid.*, r. 8, and *Re Hooley, Ex parte Hooley* (No. 2) (1898), 6 Mans. 176, where, owing to the magnitude of the case, WRIGHT, J., directed that the application should be transferred to him, and that the registrar should be present to assist the judge during the hearing of the application for discharge and of the issues.

(*l*) Bankruptcy Act, 1883 (46 & 47 Vict. c. 52), s. 99 (3).

(*m*) *Ibid.*, s. 99 (2) (c); Bankruptcy Rules, r. 7.

(*n*) Bankruptcy Act, 1883 (46 & 47 Vict. c. 52), s. 99 (2) Bankruptcy Rules, r. 3. Compare Bankruptcy Act, 1869 (32 & 33 Vict. c. 71), s. 67; Bankruptcy Rules, 1870, rr. 1, 3; and *Ex parte Lindsay, Re Lindsay* (1874), L. R. 19 Eq. 52.

(*o*) But the Lord Chancellor may from time to time direct that any specified registrar of a county court shall have and exercise all the powers of a bankruptcy registrar of the High Court (Bankruptcy Act, 1883 (46 & 47 Vict. c. 52), s. 99 (5)).

(*p*) *I.e.*, within the meaning of Bankruptcy Act, 1883 (46 & 47 Vict. c. 52), s. 99 (2) (c). See Bankruptcy Rules, r. 236.

SUB-SECT. 2. Hearing of Application.

Withdrawal of application.

411. If on the hearing the bankrupt asks for leave to withdraw his application, the court has jurisdiction to grant such leave, even if the official receiver and the creditors contend that the application for discharge should be proceeded with (*q*).

Buying off opposition.

412. Although creditors are under no obligation to appear on the hearing of an application for discharge, they are under an obligation not to contract themselves out of the opportunity of appearing (*r*). Such contracts are illegal (*s*). Suspicion of a fraudulent bargain to buy off opposition by creditors is insufficient ground for an application to rescind an order of discharge, but may justify the court in allowing an application to stand over to allow investigation (*t*).

Matters to be taken into consideration.

413. The court, on the hearing of the application, is bound to take into consideration the report of the official receiver as to the

(*q*) *Re Wallis, Ex parte Board of Trade* (1891), 8 Morr. 110. The registrar had there allowed a bankrupt to withdraw his application for discharge under s. 28 of the Bankruptcy Act, 1883 (46 & 47 Vict. c. 52), on the following terms:—"No order made except that the bankrupt be not at liberty to renew his application without the leave of the court, and notice to the official receiver, and payment of the costs." The Court of Appeal held that the words "the court shall appoint a day . . . the application shall be heard" (which occur also in s. 8 of the Bankruptcy Act, 1890 (53 & 54 Vict. c. 71)) mean "the court shall appoint a day . . . the application shall be heard, if required by the bankrupt"; that there is nothing in the Bankruptcy Act to destroy the inherent right of every court to allow an application to be withdrawn; that the registrar had jurisdiction to grant leave to withdraw the application; and that he had exercised his jurisdiction properly. See also *Re Tanner* (1902), 19 T. L. R. 28, where LINKLATER, Reg., refused to allow an application for an order of discharge to be withdrawn, and *Re Richards* (1903), 20 T. L. R. 79, as to making the payment of the costs of creditors a condition of the withdrawal. The only class of cases in which leave to withdraw an application for discharge is refused by the registrars of the High Court is the class of cases where witnesses are brought forward by the official receiver in opposition to the bankrupt's application for an order of discharge, and the opposition would probably be prejudiced if the application were withdrawn and renewed after the lapse of years (*Re Robertson* (1902), 18 T. L. R. 670, *per* LINKLATER, Reg.).

(*r*) *Kearley* v. *Thomson* (1890), 24 Q. B. D. 742, *per* FRY, L.J., at p. 445.

(*s*) *Hall* v. *Dyson* (1852), 17 Q. B. 785.

(*t*) *Re Angerstein, Ex parte Bailey* (1863), 8 L. T. 223 (petition ordered to stand over). See also *Ex parte Tallis* (1810), 1 Rose, 371; *Ex parte Cawthorne, Re Greatorex* (1814), 2 Rose, 186 (certificate recalled after two years which had been obtained by the preponderance of fictitious creditors, whose debts had been fabricated and proved with the connivance of the bankrupt); *Sievers* v. *Boswell* (1843), 3 Man. & G. 524; *Re Baum, Ex parte Baum* (1878), 7 Ch. D. 719, where the Court of Appeal vacated a resolution of creditors to discharge a liquidating debtor who had by malpractice obtained a vote in his favour, although without the vote the statutory majority was still left. Although the earlier Bankruptcy Acts contained special provisions as to the assent of creditors and against bribery which are not contained in the present Acts, the bribery of a creditor is contrary to the policy of the present bankruptcy law, and is misconduct during the bankruptcy, which the court would take into consideration in exercising its discretion under s. 8 of the Bankruptcy Act, 1890 (53 & 54 Vict. c. 71). See also *Ex parte Barron, Re Andrews* (1881), 18 Ch. D. 464, where it was held that a contract between a compounding debtor and a creditor made after the composition by the debtor with his creditors had been entered into, but before it had been completely carried out, to pay to the creditor his debt in full, was inconsistent with good faith to the creditors generally and void.

SUB-SECT. 2. Hearing of Application.

bankrupt's conduct and affairs, including his conduct during the proceedings under the bankruptcy (*a*). The court is not confined to the consideration of the particular crimes and facts hereinafter mentioned, the proof of any of which imposes a statutory limitation on its discretion (*b*), but ought not to take into consideration conduct, misbehaviour, or immorality, which can never have had anything to do with the bankruptcy at all, either to have produced it or to affect it in any way after it is produced (*c*). The court may consider only such conduct or affairs as may or can have had some effect on the bankruptcy itself (*d*).

Moral delinquencies not considered.

As to the bankrupt's conduct during the bankruptcy, the court may take into consideration any breach of the express or implied provisions of the bankruptcy law (*d*), and his refusal to perform any legal obligation, but not a refusal to comply with a merely moral obligation (*e*).

Effect of official receiver's report.

414. The report of the official receiver is, for the purposes of an application for an order of discharge, *primâ facie* evidence of the statements therein contained (*f*), being considered as a report by an officer of the court, and has the character and attributes of a report by a master; it therefore follows that statements in the report are treated as accurate, unless the bankrupt or anyone else, who is entitled to be heard on the application, can by reference to the evidence, or by evidence which he is able to furnish, establish that any of them are without foundation (*g*). If, however, the statements of fact upon which the submission of the official receiver is founded are too general, the bankrupt is not called upon to

(*a*) Bankruptcy Act, 1890 (53 & 54 Vict. c. 71), s. 8 (2).

(*b*) *Re Cook, Ex parte Cook* (1889), 6 Morr. 224.

(*c*) *Re Barker, Ex parte Constable*, and *Re Jones, Ex parte Jones* (1890), 25 Q. B. D. 285, explaining *Re Betts & Block, Ex parte Board of Trade* (1887), 19 Q. B. D. 39. For instance, a breach of promise of marriage, which occurred years before the bankruptcy, and after which the debtor had begun to trade; a judgment for breach of promise of marriage and non-payment of damages under it, or the payment under which had, even though it was paid, nothing to do with the producing of the bankruptcy, ought not to be taken into consideration (*Re Barker, supra, per* Lord ESHER, M.R., at p. 293).

(*d*) For an instance of the latter, see note (*t*), p. 244, *ante*.

(*e*) Thus the court may not take into consideration an unreasonable refusal by a bankrupt of a reasonable demand of the trustee of the property of the bankrupt to submit to a medical examination, in order that the bankrupt's life may be insured and the trustee thereby enabled to realise a contingent reversionary interest of the bankrupt (*Board of Trade* v. *Block* (1888), 13 App. Cas. 570). It was so held on the ground that the bankrupt was not under any legal obligation under s. 24 of the Bankruptcy Act, 1883 (46 & 47 Vict. c. 52), to submit to a medical examination in order to aid the realisation of his property. See further p. 75, *ante*.

(*f*) Bankruptcy Act, 1890 (53 & 54 Vict. c. 71), s. 8 (5). But, *semble*, the court is not conclusively bound by the report even in the absence of objection by the bankrupt (*Re Oswell, Ex parte Board of Trade* (1892), 9 Morr. 202, *per* VAUGHAN WILLIAMS, J., at p. 207).

(*g*) *Re Cook, Ex parte Cook* (1889), 6 Morr. 224, *per* FIELD, J., at p. 231; and see *Re Bottomley, Ex parte Bottomley* (1893), 10 Morr. 262. See also Bankruptcy Act, 1890 (53 & 54 Vict. c. 71), s. 8 (4), (5), and p. 242, *ante*. As to evidence on appeal to contradict statements in the report, see *Re Sultzberger, Ex parte Sultzberger* (1881), 4 Morr. 82, at p. 88.

SUB-SECT. 2. Hearing of Application.

answer them otherwise than generally, and in exceptional cases may disregard them altogether (*h*).

Procedure at hearing.

415. It is the practice for the report of the official receiver to be read at the beginning of the proceedings. In addition to hearing the applicant, the court may hear the official receiver and the trustee of the property of the bankrupt and any creditor (*i*). The court may put such questions to the bankrupt and receive such evidence as it may think fit (*k*); and it is the duty of the judge to take a note of the oral evidence (*l*).

SUB-SECT. 3.—*Statutory Limitations of the Court's Discretion.*

Extent of court's discretion.

416. The court having taken into consideration the report of the official receiver, and having heard the parties, and having put such questions to the bankrupt and received such evidence as it thinks fit, has an almost unlimited discretion (*m*) within the statutory limitations (*n*) as to the order which it will make.

Statutory limitations.

417. The statutory limitations of the discretion of the court are as follows:—The court may either (1) grant an absolute order of discharge (*o*); or (2) absolutely refuse an order of discharge (*p*); or (3) suspend the operation of discharge for a specified period (*q*) of any duration (*r*); or (4) grant an order of discharge subject to

(*h*) *Re Sharp, Ex parte Sharp* (1893), 10 Morr. 114, *per* VAUGHAN WILLIAMS, J., at p. 117, a case decided under Bankruptcy Act, 1890 (53 & 54 Vict. c. 71), s. 8 (3) (d). The facts of that case were very special.

(*i*) Bankruptcy Act, 1890 (53 & 54 Vict. c. 71), s. 8 (6). A person who has not proved a debt, or at least tendered a proof of debt, is not for the purposes of the exercise of creditors' rights in a bankruptcy considered to be a creditor (*Ex parte Rylands, Re Chesters* (1877), 6 Ch. D. 57, *per* COTTON, L.J., at p. 62). As to notices of intention to dispute statements in the report of the official receiver, see p. 243, *ante*.

(*k*) Bankruptcy Act, 1890 (53 & 54 Vict. c. 71), s. 8 (6). This implies a duty on the part of the bankrupt to be in court on the hearing of his application for an order of discharge. See also *Ex parte Turner, Re Wood and Tarrant* (1858), 27 L. J. (BCY.) 30, where the Lords Justices in hearing an appeal by the assignees said that, although there was then no rule of practice on the point, they were of opinion that in every case where the certificate was in question the bankrupt ought to be present in court.

(*l*) *Re Sharp, Ex parte Sharp, supra*.

(*m*) *Re Barker, Ex parte Constable*, and *Re Jones, Ex parte Jones* (1890), 25 Q. B. D. 285, *per* Lord ESHER, M.R., at p. 292.

(*n*) See Bankruptcy Act, 1890 (53 & 54 Vict. c. 71), s. 8 (2). For the statutory forms of order, see Bankruptcy Rules, Appendix, Forms, Nos. 62, 62 a, 62 b, 63, 63 a.

(*o*) *Ibid.*, No. 62. Such an order cannot be made if the bankrupt has been guilty of any of the specified crimes mentioned in the Bankruptcy Act, 1890 (53 & 54 Vict. c. 71), s. 8 (2), or if any of the facts mentioned *ibid.*, s. 8 (3), or in the Bankruptcy Act, 1883 (46 & 47 Vict. c. 52), s. 29, are proved to the satisfaction of the court. Form No. 62 further implies that an absolute order will not be immediately made where the bankrupt, although not guilty of any of the statutory crimes or offences, has been guilty of misconduct in relation to his property and affairs. For a case where an absolute order of discharge was granted, see *Re Gould, Ex parte Gould* (1890), 7 Morr. 215.

(*p*) Bankruptcy Rules, Appendix, Forms, No. 62 a.

(*q*) *Ibid.*, No. 62 b.

(*r*) These words are implied by the statute; but if the case falls within the Bankruptcy Act, 1890 (53 & 54 Vict. c. 71), s. 8 (3) (a)—(l), or the Bankruptcy

SUB-SECT. 3. Statutory Limitations of Court's Discretion.

any conditions with respect to any earnings or income which may afterwards become due to the bankrupt, or with respect to his after-acquired property (*s*); or (5) exercise the above powers of suspending and of attaching conditions to a bankrupt's discharge concurrently (*t*).

The exercise, however, of the above powers is limited by two important statutory exceptions (*u*).

Absolute refusal of discharge.

418. In the first place, the court must refuse the discharge absolutely (*w*) in all cases where the bankrupt has committed any misdemeanour under the Debtors Act, 1869 (*x*), or the Bankruptcy Act, 1883 (*y*), or any other misdemeanour connected with his bankruptcy, or any felony connected with his bankruptcy, unless for special reasons (*z*) the court otherwise determines (*a*).

Act, 1883 (46 & 47 Vict. c. 52), s. 29, the minimum period of suspension is two years (*Re Oswell, Ex parte Board of Trade* (1892), 9 Morr. 202). As to this, see p. 248, *post*. The court, however, does not as a rule approve of suspensions for three months or six months, for such a suspension is more than a nominal punishment and yet not sufficient to discourage debtors from committing misconduct. There may, however, be cases in which such a suspension would be justifiable (*Re Freeman, Ex parte Freeman* (1890), 7 Morr. 38, *per* CAVE, J., at p. 47). Suspension for five years should be reserved for very bad cases (*Re Swabey, Ex parte Swabey* (1897), 76 L. T. 534, in the special facts of which case the Divisional Court reduced the term of suspension from five years to two years). But where a bankrupt had omitted to keep proper books of account, and had continued to trade after knowing himself to be insolvent, and had contracted debts provable in the bankruptcy without having at the time any reasonable or probable ground of expectation of being able to pay them, and had been guilty of other misconduct not falling within s. 28 (3) of the Bankruptcy Act, 1883 (46 & 47 Vict. c. 52), and the court was of opinion that he was unfit to be allowed to trade, the Divisional Court dismissed the appeal of the bankrupt from the order of the county court judge, who had refused the discharge absolutely, although he had not committed any misdemeanour under the Bankruptcy Act, 1883 (46 & 47 Vict. c. 52), or the Debtors Act, 1869 (32 & 33 Vict. c. 62) (*Re Cook, Ex parte Cook* (1889), 6 Morr. 224).

(*s*) Bankruptcy Rules, Appendix, Forms, No. 63. As to accounts of after-acquired property and verification, see *ibid.*, rr. 244 and 244 A. As to the form of affidavit by a bankrupt, whose discharge has been granted conditionally, as to after-acquired property or income, see *ibid.*, Appendix, Forms, No. 65 b. As to conditional orders, see p. 250, *post*, and *Re Shackleton, Ex parte Shackleton* (1889), 6 Morr. 304, at p. 307. As to modification of the terms of the order after two years on the application of the bankrupt, see Bankruptcy Act, 1890 (53 & 54 Vict. c. 71), s. 8 (2), and *Re Durnford* (1895), 2 Mans. 521, and p. 267, *post*.

(*t*) Bankruptcy Act, 1890 (53 & 54 Vict. c. 71), s. 8 (7).

(*u*) *I bid.*, s. 8 (2), (3); and Bankruptcy Act, 1883 (46 & 47 Vict. c. 52), s. 29.

(*w*) See Bankruptcy Rules, Appendix, Forms, No. 62 a.

(*x*) 32 & 33 Vict. c. 62; and see pp. 345 *et seq.*, *post*.

(*y*) 46 & 47 Vict. c. 52. See s. 31.

(*z*) The special reasons should be stated in the order (*Re Stevens, Ex parte Board of Trade*, [1898] 2 Q. B. 495).

(*a*) Bankruptcy Act, 1890 (53 & 54 Vict. c. 71), s. 8 (2). Only such felonies and misdemeanours are included in the above proviso as are *ejusdem generis* with the misdemeanours dealt with by the Acts above mentioned. It would certainly be an offence connected with the bankruptcy, if there was a conviction upon facts which resulted in or brought about the debtor's insolvency (*Re Hedley, Ex parte Board of Trade*, [1895] 1 Q. B. 923, *per* VAUGHAN WILLIAMS, J., at p. 925). It would also be an offence connected with the bankruptcy, if the facts upon which the conviction was based consisted in misconduct by the bankrupt either as a bankrupt or in view of impending bankruptcy. Compare the

SUB-SECT. 3. **Statutory Limitations of Court's Discretion.**

Special reasons for granting discharge.

In hearing an application for an order of discharge on the ground of "special reasons" the court cannot disregard the conduct of the bankrupt during the bankruptcy. The court, in determining whether there are special reasons, may and should take into consideration the object of the offender, and the circumstances in which the offence was committed, and the view taken by the judge at the trial (*b*). It is very doubtful whether the good conduct of the bankrupt after the refusal of an application for discharge would be by itself a "special reason" (*c*). Even although there be special circumstances, an immediate discharge should not be granted. There should be a period of probation, during which, if the bankrupt conducted himself badly, he would forfeit all chance of taking advantage of the mitigating circumstances which were present when the offence was committed (*d*).

Refusal of immediate unconditional discharge.

419. In the second place, the court must (*e*), on proof of any of the facts hereinafter mentioned, either (1) refuse the discharge absolutely (*f*); or (2) suspend the discharge for a period of not less than two years (*g*); or (3) suspend the discharge until a dividend of not

interpretation by the Court of Appeal in *Re Brocklebank, Ex parte Dunn* (1889), 23 Q. B. D. 461, of the somewhat similar language of the Bankruptcy (Discharge and Closure) Act, 1887 (50 & 51 Vict. c. 66), s. 2 (3). As to what is not a misdemeanour within the section, see *Re Cranston, Ex parte Cranston* (1892), 9 Morr. 160, in which case it was held that the bankrupt had not been guilty of a misdemeanour or any fraud under the Statute of Elizabeth or the bankruptcy law or otherwise.

(*b*) *Re Solomons*, [1904] 1 K. B. 106.

(*c*) In *Re Solomons, supra*, the Court of Appeal refused to decide the point.

(*d*) *Re Solomons, supra*, where the Court of Appeal allowed an appeal from the refusal of the registrar to put into the paper a third application of the bankrupt to fix a day for rehearing the application for discharge, three years having elapsed from the date when the discharge was absolutely refused, and heard the application on the merits without remitting the case to the registrar. See further, as to "special reasons," *Re Stevens, Ex parte Board of Trade*, [1898] 2 Q. B. 495. It is submitted that there were in that case "special reasons" sufficient to support the order there made; but that the order was made without jurisdiction if, as the Divisional Court held, there were no "special reasons" within the meaning of the section. The order may best be explained by the fact that there were strong mitigating circumstances, and the Board of Trade raised no objection to the order.

(*e*) Bankruptcy Act, 1890 (53 & 54 Vict. c. 71), s. 8 (2).

(*f*) Bankruptcy Rules, Appendix, Forms, No. 62 a. When on the hearing of the application the judge is of opinion that the bankrupt is not entitled to an absolute discharge, and also feels himself unable to fix a period of suspension, he may in refusing to grant a discharge reserve liberty to the bankrupt to apply again, in which case the bankrupt may apply again in pursuance of the leave reserved as a matter of right; but having regard to s. 104 of the Bankruptcy Act, 1883 (46 & 47 Vict. c. 52), which provides that every court having jurisdiction in bankruptcy under that Act may review, rescind, or vary any order made by it under its bankruptcy jurisdiction, it is more convenient that in such a case the judge should refuse the discharge absolutely. When the discharge is absolutely refused, the bankrupt cannot apply *de novo* as a matter of right; but there is no reason why the punishment should not be remitted at any distance of time on an application under s. 104, if it is shown that the object of the punishment has been effected (*Re Tobias & Co., Ex parte Tobias*, [1891] 1 Q. B. 463).

(*g*) Bankruptcy Rules, Appendix, Forms, No. 62 b. If the facts are proved, the court cannot suspend the discharge for less than two years; but the court must find that the facts exist (*Re Oswell, Ex parte Board of Trade* (1892), 9

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less than ten shillings in the pound has been paid to the creditors (*h*); or (4) require the bankrupt as a condition of his discharge to consent to judgment being entered against him by the official receiver or trustee of the property of the bankrupt for any balance or part of any balance of the debts provable under the bankruptcy which is not satisfied at the date of the discharge (*i*), such balance

Morr. 202; *Ex parte Dallmeyer*, *Re Dallmeyer* (1906), 22 T. L. R. 445). A suspension for five years should be reserved for very bad cases (*Re Swabey*, *Ex parte Swabey* (1897), 76 L. T. 534). There is no jurisdiction to suspend an order till two conditions have been satisfied, one of time and one of payment (*Re Walmsley* (1908), 98 L. T. 55).

(*h*) Such an order ought not to be made unless there is a reasonable prospect that some funds or property will be forthcoming which may be made available for the payment of the debts of the bankrupt (*Re Marley*, *Ex parte Marley* (1900), 82 L. T. 692). See *Re Shackleton*, *Ex parte Shackleton* (1889), 6 Morr. 304, 307. As to the form of the order, see Bankruptcy Rules, Appendix, Forms, No. 62 b. Whenever such a conditional order is made, if a windfall exceeding the dividend provided for by the order comes to the bankrupt after the order and before the condition has been fulfilled, this does not affect the discharge; but the money remains in the hands of the trustee of the property of the bankrupt, and the creditors get the advantage of the windfall, not the bankrupt (*Re Hawkins*, *Ex parte Official Receiver*, [1892] 1 Q. B. 890, 900). The court has no jurisdiction to exclude a particular class of creditors, *e.g.*, those for money lent, from participation in the dividend (*Re Carne*, *Ex parte Jackson* (1889), 6 Morr. 55). Compare *Re Richards*, *Ex parte Evans* (1893), 10 Morr. 136.

(*i*) For form of order, see Bankruptcy Rules, Appendix, Forms, No. 63 a. Such an order must not be signed, completed, or delivered out until the bankrupt has given the required consent in the prescribed form, No. 64. The judgment must be entered in the court having jurisdiction in the bankruptcy in which the order of discharge is granted, and, if entered in the High Court, must be in the Form No. 65, with such variations as circumstances may require (*ibid.*, r. 240 (1)). Where a discharge was granted by a county court subject to the condition that the bankrupt should consent to judgment being entered against him by the trustee of the property of the bankrupt for any balance of the debts provable under the bankruptcy which was not satisfied at the date of that order, and the amount of the provable debts not satisfied at that date was a sum of £3,500, it was held that the judgment must be entered in that court, although the amount exceeded £50 (*Re Howe* (1887), 18 Q. B. D. 573).

The registrar of a county court in which judgment is so entered is required to make a return of the judgment to the registrar of county court judgments (Bankruptcy Rules, r. 240 (2)). The registrar of a county court is not entitled to any fee for entering the judgment (*Re Howe*, *supra*).

If the bankrupt does not give the required consent within one month of the making of the conditional order, the court may, on the application of the official receiver or trustee of the property of the bankrupt, revoke the order or make such other order as it may think fit (Bankruptcy Rules, r. 240 (3); see p. 266, *post*); but the court cannot go on making the same order over and over again and thus suspend the discharge till the bankrupt consents (*Re Gaskell*, [1904] 2 K. B. 478). When the order is revoked, the bankrupt cannot dictate to the court that the only order to be made is simply to suspend his discharge for two years (*ibid.*).

When the court grants a conditional order of discharge in the terms of Form No. 63 a, the condition of the bankrupt's discharge is not only his consent to judgment, but also the due performance of the judgment; and hence, if the bankrupt fails without good cause to pay the instalments, the court can revoke the order of discharge under Bankruptcy Act, 1883 (46 & 47 Vict. c. 52), s. 104 (*Re Summers*, *Ex parte Official Receiver*, [1907] 2 K. B. 166).

By the words "part of any balance" the Legislature did not mean to exclude any part of the creditors from the benefit of the judgment, but a part of the liability (*Re Richards*, *Ex parte Evans* (1893), 10 Morr. 136). The court may make it a condition that the bankrupt consent to judgment being entered against him for the whole of the balance or for any part of the balance, whether

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or part of any balance of the debts to be paid out of the future earnings or after-acquired property of the bankrupt in such manner and subject to such conditions as the court may direct; but execution may not be issued on the judgment without leave of the court, which leave may be given on proof that the bankrupt has since his discharge acquired property or income available towards payment of his debts (*k*); or (5) exercise the above powers of suspending and of attaching conditions to a bankrupt's discharge concurrently (*l*).

Principles regulating imposition of conditions.

420. Where there is no evidence that a bankrupt will ever have after-acquired property, *primâ facie* the court ought not to fetter a bankrupt by making the discharge subject to the condition that he consent to judgment (*m*). Before such an order is made against a bankrupt, it should be shown that he has some expectation of coming into property which, but for an order of this kind, he would be able to enjoy without paying his debts (*n*). Unless the court finds a man in receipt of an income, derived from his earnings or otherwise, which is more than sufficient to keep his family in the enjoyment of the ordinary necessities of life according to their station, or unless the court is satisfied that he is likely to succeed to property, it is not in the interests of the State to discourage a bankrupt by granting an order of discharge subject to conditions which impose such a burden on him that he can have no hope of bettering his position (*o*). If it is intended that a man shall not have his discharge at all, the simple and straightforward course is to refuse his discharge absolutely, and not to give it on a condition with which there is no probability that the bankrupt will be able to comply (*p*).

more or less than ten shillings in the pound (*ibid.*). For cases where such orders have been made on the appeal of the bankrupt, see *Re Clarkson, Ex parte Allistree; Re Clarkson, Ex parte Clarkson* (1885), 2 Morr. 219; and *Re Small & Small, Ex parte Small & Small* (1886), 3 Morr. 296.

(*k*) The application for such leave, which is made by the official receiver or trustee, must be in writing and state shortly the grounds on which the application is made. When the application is lodged, the registrar is required to fix a day for the hearing of the application. The official receiver or the trustee of the property of the bankrupt, as the case may be, is required to give notice of the application to the bankrupt not less than eight days before the day appointed for the hearing of the application and to furnish the bankrupt at the same time with a copy of the application (Bankruptcy Rules, r. 243).

(*l*) Bankruptcy Act, 1890 (53 & 54 Vict. c. 71), s. 8 (7). In *Re Dallmeyer, Ex parte Dallmeyer* (1906), 22 T. L. R. 445, the registrar had granted the discharge and ordered the bankrupt, after setting aside £500 a year out of his earnings for his own support, to pay the surplus, if any, to the trustee of the property of the bankrupt until the creditors should have received ten shillings in the pound on their debts, yearly accounts to be rendered by the bankrupt. The bankrupt appealed on the ground that the order did not strictly comply with the provisions of the statute. The Court of Appeal varied the order by suspending the bankrupt's discharge for two years from the date on which the order had been made by the registrar and subject to the same conditions as were already contained therein.

(*m*) *Re Bullen, Ex parte Arnaud* (1888), 5 Morr. 243.

(*n*) *Re Gould, Ex parte Gould* (1890), 7 Morr. 215.

(*o*) *Re Shackleton, Ex parte Shackleton* (1889), 6 Morr. 304. See also *Re Gaskell*, [1904] 2 K. B. 482; *Re Hawkins*, [1892] 1 Q. B. 890, 893.

(*p*) *Re James, Ex parte James* (1891), 8 Morr. 19. Compare *Re Marley, Ex parte Marley* (1900), 82 L. T. 692.

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Where there is no fair reason to suppose that the bankrupt will come into possession of assets which will enable him to comply with the order, the better plan, in a small case, is to estimate at once the punishment which the bankrupt ought to undergo, and to suspend his discharge for a definite time (*q*).

Facts preventing immediate unconditional discharge.

421. The facts above referred to (*r*), the proof of any of which limits the discretion of the court, and prevents the court from granting an immediate unconditional order of discharge (*s*), include acts of the bankrupt committed before, as well as after, the Bankruptcy Act, 1890, came into operation (*t*). They are as follows:—

(1) Assets under ten shillings in the pound.

422. That the bankrupt's assets are not of a value equal to ten shillings in the pound on the amount of his unsecured liabilities (*a*), unless he satisfies the court that this fact has arisen from circumstances for which he cannot justly be held responsible (*b*).

A bankrupt's assets are deemed to be of a value equal to ten shillings in the pound on the amount of his unsecured liabilities when the court is satisfied that the property has realised, or is likely to realise, or with due care in realisation might have realised, an amount equal to ten shillings in the pound on his unsecured liabilities, of the amount of which liabilities a report by the official receiver or the trustee of the property of the bankrupt is *primâ facie* evidence (*c*).

(2) Omission to keep proper books.

423. That the bankrupt has omitted (*d*) to keep such books of account as are usual and proper in the business carried on by him and as sufficiently disclose his business transactions and financial position (*e*) within three years immediately preceding his bankruptcy (*f*).

(*q*) *Re James, Ex parte James* (1891), 8 Morr. 19.

(*r*) See p. 248, *ante*, and Bankruptcy Act, 1890 (53 & 54 Vict. c. 71), s. 8 (3), and Bankruptcy Act, 1883 (46 & 47 Vict. c. 52), s. 29.

(*s*) *Re Heap, Ex parte Board of Trade* (1887), 4 Morr. 314. The prescribed form of order (Bankruptcy Rules, Appendix, Forms, No. 62) granting an immediate and unconditional order of discharge further implies that such an order will not be granted, even if none of the crimes or facts in the proviso are proved, if it be proved "that the bankrupt has been guilty of any misconduct in relation to his property and affairs."

(*t*) *Ex parte Rogers, Re Rogers* (1884), 13 Q. B. D. 438, decided under Bankruptcy Act, 1883 (46 & 47 Vict. c. 52), ss. 18, 28 (3) (d). See also *Re Salaman, Ex parte Salaman* (1885), 14 Q. B. D. 936. The same principle applies to the special crimes which compel the court to refuse the discharge absolutely. See p. 247, *ante*.

(*a*) In "unsecured liabilities" are included unsecured liabilities which existed at the date of the receiving order, but from which the bankrupt has been subsequently released (*Re De Bernales* (1902), 18 T. L. R. 505, *per* GIFFARD, REG., at p. 506).

(*b*) Bankruptcy Act, 1890 (53 & 54 Vict. c. 71), s. 8 (3) (a).

(*c*) *Ibid.*, s. 8 (4).

(*d*) Under the present Act it is an offence for a trader to omit to keep proper books of account, although the omission is not wilful.

(*e*) The words "financial position" mean financial position with regard to the trade carried on, not financial position generally (*Re Mutton, Ex parte Board of Trade* (1887), 19 Q. B. D. 102). Thus a hatter who kept proper books of his business of a hatter was held by the Court of Appeal to be under no obligation to keep books relating to certain purchases of land made by him (*ibid.*).

(*f*) Bankruptcy Act, 1890 (53 & 54 Vict. c. 71), s. 8 (3) (b).

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Object of requiring proper books to be kept.

The object of requiring a trader to keep proper books is that the court and the creditors may be enabled to see in case of bankruptcy what his transactions have been, and to acquire a knowledge of them without a prolonged and expensive examination by accountants. Another object is to force upon a trader the contemplation of his own position, and to deprive him of the power to plead, if he should become bankrupt, that, although he continued to trade when he was insolvent, he did so in ignorance of his insolvency (*g*)

Books to be kept.

A man engaged in trade or business must keep such books as are usually kept in the particular trade or business. If, however, there are no books usually kept in the particular trade or business, the case does not come within the provision. A man out of business need not keep books at all; and if a business man keeps business books, he need not put down his private transactions in them (*h*).

Entries which should be made.

Carrying on a business involves, as a general rule, transactions from time to time. But if a first transaction alone was that which, if repeated, would be a transaction in a business, and if the first transaction was undertaken with the intent of carrying on the business of which it is a transaction, then the first transaction will be a transaction in an existing business; and if it is the first transaction in a business in which it is proper to keep books, those books ought to be kept from the moment of the beginning of the first transaction (*i*).

Balancing.

A trader's books should be properly kept and balanced from time to time, so that at any moment the real state of his affairs may at once appear. It is not enough that there should be books with entries in them which would require a prolonged examination by a skilled accountant to ascertain their effect (*j*).

(*g*) *Re Heap, Ex parte Board of Trade* (1887), 4 Morr. 314, *per* CAVE, J., at p. 316. It is therefore important that the report of the official receiver should show for how long the books of a bankrupt have shown an insolvency, or would have shown an insolvency if they were inquired into (*ibid.*).

(*h*) *Re Mutton, Ex parte Board of Trade* (1887), 19 Q. B. D. 102.

(*i*) *Re Griffin, Ex parte Board of Trade* (1890), 8 Morr. 1, at p. 9.

(*j*) *Ex parte Reed & Bowen, Re Reed & Bowen* (1886), 17 Q. B. D. 244. See also *Re Heap, Ex parte Board of Trade, supra*, and *Re Smart* (1849), Fonbl. 14. It was repeatedly held under the old law (and it is still the law) that a cash-book properly kept and posted up was a *sine quâ non* for the granting of an immediate certificate to a bankrupt trader. The cash-book tests the accuracy of all the other books, and shows the expenses from day to day (*Re Sparrow* (1850), Fonbl. 69). See also *Re Tracey* (1849), Fonbl. 13, which shows how a ledger should be kept; *Re Carter, Ex parte Carter*(1850), Fonbl. 83, where it was held that a solicitor, who also carried on the business of a newspaper proprietor, was bound to keep the books usual in that business in addition to his ordinary professional accounts; *Ex parte Nicholson, Re Nicholson* (1859), 1 De G. F. & J. 270, where the cash-book was discontinued; *Re Rieber* (1868), 19 L. T. 24, where a trader's books had not been posted up for a year; *Ex parte Reed & Bowen, Re Reed & Bowen, supra*, where on an application to approve a scheme of arrangement it was held to be a serious offence, having regard to the intricacy and magnitude of the business, for a trader not to keep ledgers and cash-books properly posted up and balanced. In a case of exceptional gravity, where a trader has been guilty of this and other offences, the Court may be justified in refusing a discharge altogether, although the bankrupt has not been guilty of any of the crimes specified in s. 8 (2) of the Bankruptcy Act, 1890 (53 & 54 Vict. c. 71) (*Re Cook, Ex parte Cook* (1889), 6 Morr. 224). The omission by a trader to keep proper books of account, so as

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(3) Trading with knowledge of insolvency.

424. That the bankrupt has continued to trade after knowing himself to be insolvent (*k*).

A man has a perfect right, so long as he is solvent, to go on with a losing business; but the moment he becomes insolvent he is going on at the risk of his creditors. The moment things have got to such a pitch that he cannot pay twenty shillings in the pound, although he may nevertheless think that if he goes on he may be able to retrieve his position, he ought to call together his creditors, who will have to bear the loss in case his calculations are wrong, and leave them to determine whether that course of going on should be proceeded with (*l*). But it is not enough to consult only the largest creditors (*m*). There is no insolvency within the meaning of this offence if a careful, prudent, and unhurried realisation of the assets would produce enough to pay twenty shillings in the pound on the amount of the liabilities (*n*).

Meaning of insolvency.

Knowledge of insolvency.

It is essential to this offence that there should be knowledge of insolvency. If the trader has kept proper books in a proper manner, he will not as a rule be able to say that he was ignorant of his insolvency (*o*).

The seriousness of this offence depends upon the circumstances of the particular case (*p*).

(4) Contracting debts without expectation of ability to pay.

425. That the bankrupt has contracted any debt (*q*) provable in the bankruptcy without having at the time of contracting it any

to disclose the true position of his affairs to himself, may be material to show that he has been guilty of rash and hazardous speculation (*Re Rieber* (1868), 19 L. T. 24).

(*k*) Bankruptcy Act, 1890 (53 & 54 Vict. c. 71), s. 8 (3) (c).

(*l*) *Re Stainton, Ex parte Board of Trade* (1887), 4 Morr. 242, at p. 251.

(*m*) *Re Heap, Ex parte Board of Trade* (1887), 4 Morr. 314, 317.

(*n*) If therefore the trader believed that such a realisation would produce twenty shillings in the pound, this offence is not established, although the trader knew that a forced sale would not produce that result (*Re John Brown & Co.* (1906), 22 T. L. R. 291). There is a distinction between "insolvency" and the "inability to pay debts as they become due" referred to pp. 258, 259, *post* (*Re Scharrer* (1888), 4 T. L. R. 627). The definition of Sir G. Rose that "a man must be taken to be insolvent who is not able to meet his engagements" (*Ex parte Pearse, Re Foxwell* (1832), 2 Deac. & Ch. 451, at p. 455) cannot be regarded as applicable to the present section in so far as it ignores the above distinction.

(*o*) *Re Heap, Ex parte Board of Trade, supra.*

(*p*) Thus in *Re Swabey, Ex parte Swabey* (1897), 76 L. T. 534, where trade debts to a small amount had been incurred with a knowledge of insolvency, the Divisional Court intimated that a suspension of a discharge for five years should be reserved for very bad cases, and in the special circumstances reduced the period of suspension from five years to the minimum period of two years. Where, however, the bankrupt has been guilty of this offence and of other serious misconduct, the court may in a case of exceptional gravity be justified in refusing the discharge altogether, although the bankrupt has not been guilty of any of the crimes specified in s. 8, sub-s. 2, of the Bankruptcy Act, 1890 (53 & 54 Vict. c. 71) (*Re Cook, Ex parte Cook* (1889), 6 Morr. 224). It is grave misconduct in bankers to continue to trade and receive deposits after knowledge of their insolvency (*Ex parte Rufford* (1852), 2 De G. M. & G. 234). In *Re Eliot* (*Weymouth Old Bank Case, ex relatione* counsel in the case) the discharge of private bankers guilty of this offence was suspended for four years.

(*q*) The section refers only to debts arising *ex contractu* in the strict sense of the term. Damages and costs against a co-respondent in a divorce suit are

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reasonable or probable ground of expectation (*r*) (the proof of which lies on him (*s*)) of being able himself (*t*) to pay it (*a*).

The offence is not committed merely because a bankrupt has contracted in the aggregate debts to a greater amount than he could reasonably be expected to pay (*b*).

Essentials of offence.

It has been said (*c*) that the gist of the offence is that a debtor should lead persons to believe that he is in solvent circumstances when he is not. But the offence may be established, although the debtor made no express representation as to his financial position, and although his conduct was not tainted with fraud, if in fact he had no reasonable expectation of being able to pay the debt, and credit was given to him in the belief that he was solvent, whereas he was insolvent and did not inform the creditor of the fact (*d*). The ordinary case of a man overdrawing his account

not within the section (*Ex parte Griffiths, Re Griffiths* (1864), 33 L. J. (BCY.) 44; *Ex parte Clayton, Re Clayton* (1869), 5 Ch. App. 13). Nor are costs against a defendant in a patent suit (*Ex parte Goodier, Re Goodier* (1870), 22 L. T. 426). Nor are damages and costs in an action of breach of promise of marriage (*Re Billingham* (1865), 13 L. T. 25); for at the time of the promise no debt was contracted. Nor are costs incurred by an unsuccessful action by the bankrupt (*Re Williams* (1884), 1 Morr. 91).

(*r*) There must have been an absence of a reasonable probability, reasonably supposed by the debtor to exist at the time of the debt being contracted, that he would be able to pay the debt. Thus, where a trader has a reasonably grounded expectation that another firm or private friends would enable him to meet his engagements, the offence is not established (*Ex parte Mortimore, Re Mortimore* (1861), 3 De G. F. & J. 599, decided under the Act of 1849).

(*s*) The court always requires the debts, which are alleged to have been contracted without reasonable expectation of being able to pay them, to be specified (*Ex parte Brundrit, Re Caldwell* (1867), 3 Ch. App. 26); and it was held in *Re Sharp, Ex parte Sharp* (1893), 10 Morr. 114, that a bankrupt is not bound to discharge the burden of proof thrown on him by the section, where the charges against him are too general, as where the report of the official receiver merely set forth certain debts and stated that they were debts incurred to an extent which could not be justified in the case of a man whose capital was not immediately realisable to the extent to which the bankrupt's capital was not immediately realisable; and that, even if the bankrupt was bound to answer general charges, a bankrupt would discharge the burden by general denials of general charges.

(*t*) This is the construction of the section adopted by all the registrars of the High Court (*Re Adams* (1903), 19 T. L. R. 640). Compare *Ex parte Mee* (1866), 1 Ch. App. 337.

(*a*) Bankruptcy Act, 1890 (53 & 54 Vict. c. 71), s. 8 (3) (d).

(*b*) *Ex parte Brundrit, Re Caldwell, supra, per* Lord CAIRNS, L.J., at p. 28: "It is said that the bankrupt systematically lived beyond his income, and therefore must have contracted debts without any expectation of being able to pay them. But if a man having £100 in hand were to contract debts to that amount, it would be impossible to say that he contracted them without reasonable expectation of being able to pay them. If he then were to contract further debts to the same amount, and apply the £100 in paying them, so as to leave only the earlier debts subsisting, blameable as such conduct would be, I do not think that it could be brought within the provisions of this section, there being no debt provable under his bankruptcy which he had contracted without a reasonable expectation of being able to pay it." Compare *Re Rieber* (1868), 19 L. T. 24,

(*c*) See *per* CAVE, J., in *Re Sultzberger, Ex parte Sultzberger* (1887), 4 Morr. 82, at p. 88, where the offence was not established, since the debts in question were loans from friends who were well aware of the position of the bankrupt.

(*d*) In *Re Marks* (1866), 1 Ch. App. 334, it was held that although the bankrupt had been going on recklessly and had misled his creditors by saying he would

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at his bankers' without any misrepresentation is not within the enactment (*e*).

If a manufacturer buys goods at a reasonable amount for the purpose of manufacture, it does not follow, because he is insolvent at the time, that he buys them without any reasonable expectation of being able to pay for them; he may not unreasonably entertain the idea that he will be able to pay for the goods he buys, and by the use of them make profits which will by degrees pay off his old debts (*f*). But it is a very serious offence for a trader to buy goods on credit systematically for the purpose of selling them under cost price (*g*).

Purchases by insolvent persons.

If a person accepts a bill for the accommodation of another, he contracts a debt within the meaning of the section; and he will not discharge the burden imposed on him by proving that he believed at the time of contracting the debt that the other was solvent (*h*).

Accommodation bill.

426. That the bankrupt has failed to account satisfactorily for any loss of assets or for any deficiency of assets to meet his liabilities (*i*).

(5) Not accounting for loss of assets.

427. That the bankrupt has brought on or contributed to his bankruptcy by rash and hazardous speculations, or by unjustifiable

(6) Rash and hazardous speculations, extravagance, etc.

pay twenty shillings in the pound, there was not sufficient evidence for finding that the bankrupt had no reasonable or probable ground of expectation of being able to pay the debt in question. That, however, was a decision under s. 159 of the Bankruptcy Act, 1861 (24 & 25 Vict. c. 134), where the burden of proof was on those who opposed the discharge and not on the bankrupt, as it is under the present Act. But under the repealed s. 28 (3) (c) of the Bankruptcy Act, 1883 (46 & 47 Vict. c. 52), which is in the same terms as the present sub-section, it was held that where the bankrupts went into business without capital other than borrowed capital and contracted debts in the business, and it was proved that the bankrupts had given to the person who advanced the capital a deed of mortgage which empowered him to seize all their assets, the offence was established, although it appears from the report of the case that the bankrupts alleged, and it was assumed in their favour, that they were not aware of the effect of the mortgage deed (*Re White, Winter & Co., Ex parte White, Winter & Co.* (1885), 2 Morr. 42).

(*e*) *Ex parte Harrison, Re Baillie & Harrison* (1866), 2 Ch. App. 195.

(*f*) *Ex parte Bayley, Re Ainsworth* (1867), 3 Ch. App. 244, decided under s. 159 of the Bankruptcy Act, 1861 (24 & 25 Vict. c. 134).

(*g*) *Ex parte Holthouse, Re Holthouse* (1851), 1 De G. M. & G. 237. See also the cases cited p. 261, note (*q*), *post*.

(*h*) *Ex parte Barker, Re Barker* (1864), 33 L. J. (BCY.) 13, where, accommodation bills having been accepted without consideration by the bankrupt for a firm of high standing and reputation, to which the bankrupt was largely indebted, Lord WESTBURY, L.C., refused to interfere with an order refusing the bankrupt's discharge absolutely, although the bankrupt believed the firm to be solvent at the time when he accepted the bills. This interpretation of the Bankruptcy Act, 1861 (24 & 25 Vict. c. 134), s. 159, was approved on grounds of public policy by Lord CRANWORTH, L.C., in *Ex parte Mee* (1866), 1 Ch. App. 337. The principle of those decisions applies with even greater force at the present time, since now the burden of proof is on the bankrupt, and not, as formerly, on those who oppose the bankrupt's application for an order of discharge. See *Re Hughes* (1887), 3 T. L. R. 520. Compare *Re Adams* (1903), 19 T. L. R. 640, where it was held *per* HOPE, REG., that a bankrupt surety will not discharge the burden on him by showing that the creditor held sufficient security, and that the bankrupt must prove that he had a reasonable and probable expectation of being able to pay the debt himself.

(*i*) Bankruptcy Act, 1890 (53 & 54 Vict. c. 71), s. 8 (3) (e).

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extravagance in living, or by gambling, or by culpable neglect of his business affairs (*j*).

Whether the bankrupt has committed this offence or not must be in every case a question of fact; and when the court below finds the fact against the bankrupt, the Court of Appeal will require a very strong case to overrule that finding.

Meaning of "speculation."

It is difficult to define the word "speculation"; but if a man advances money on that which may succeed or may not, it must be a speculation. Where there is a mere chance whether the speculation succeeds or not, it is a hazardous speculation. But with respect to the person speculating, what may be hazardous to one man may not be so hazardous to another. A speculation may be more or less hazardous as the speculator has more or less capital. To bring the case within the Act, the speculation must be rash as well as hazardous. The word "rash" must apply to the conduct of the bankrupt alone, according to his condition and the circumstances and facts of the particular case (*k*).

This offence may now be proved although the acts complained of did not bring about the bankruptcy, if it be proved that they contributed to the bankruptcy. The offence, however, must be strictly proved. And it is the practice of the court to require the transactions which are alleged to be rash and hazardous to be specified, so that the court may apply its mind to all the circumstances under which the transactions took place; and it is wrong to deal with the facts as a question of aggregates (*l*).

(*j*) Bankruptcy Act, 1890 (53 & 54 Vict. c. 71), s. 8 (3) (f).

(*k*) *Re Keays, Ex parte Keays* (1891), 9 Morr. 18, *per* Lord ESHER, at p. 22. In the same case LOPES, L.J., said at p. 23: "In my opinion a speculation which no reasonably careful man would enter into, having regard to all the circumstances of the case, is a rash and hazardous speculation; and by all the circumstances of the case I mean his own means and all the surrounding circumstances connected with the matter." See also the definition of rash and hazardous speculation by Lord WESTBURY, L.C., in *Re Downman, Ex parte Downman* (1863), 32 L. J. (BCY.) 49, and the comment of BRETT, M.R., in *Re Young, Ex parte Young* (1885), 2 Morr. 37, at p. 40.

(*l*) *Re John Brown & Co.* (1906), 22 T. L. R. 291; *Re Scharrer* (1888), 4 T. L. R. 627. Compare *Ex parte Brundrit, Re Caldwell* (1867), 3 Ch. App. 26.

As to what does amount to rash and hazardous speculation the following cases may be consulted: *Re Buckland* (1852), Fonbl. 250 (trading to extent of thousands where trader has no capital to meet losses is "reckless trading"); *Re Fryer, Ex parte Fryer* (1864), 10 L. T. 197, where it was held that a trader cannot be allowed with the chance of gain only to himself to speculate with impunity with what may more properly be called the goods of others, where, should the adventure prove unsuccessful, he has no means of meeting the losses; *Ex parte Braginton, Re Braginton* (1866), 14 L. T. 277 (acceptances by country bankers of bills of foreign bank to large amounts after failure of the foreign bank to meet earlier acceptances); *Re Wilson* (1866), 14 L. T. 492 (speculative dealings by share broker largely on his own account); *Ex parte Hartmann, Re Hartmann* (1867), 15 L. T. 640 (speculations by trader with small capital such as no reasonable man would embark in); *Ex parte Heyn, Re Heyn* (1867), 2 Ch. App. 650, where it was held that though transactions in cotton were within the limits of legitimate business, yet the article was among the most fluctuating in price and the transactions of the most hazardous nature of any within those limits and required the bankrupt to exercise the utmost caution and prudence in extending his liabilities; and under the repealed s. 28 of the Bankruptcy Act, 1883 (46 & 47 Vict. c. 52), *Re Rogers, Ex parte Rogers* (1884), 13 Q. B. D. 438 (financing debtor known to be in difficulties and allowing debt to be increased from £32,000 to

The court is not concerned with the general morality of the transactions, provided that they are not in contravention of this enactment (*m*).

When a bankrupt has lived greatly beyond his income, and has

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£60,000, the increase as to £11,000 being in respect of accommodation bills); *Re Young, Ex parte Young* (1885), 2 Morr. 37 (loan by managing director of his own money and money borrowed from his mother to mining company, the mines of which were undeveloped, and which afterwards became insolvent); *Ex parte Salaman, Re Salaman* (1885), 14 Q. B. D. 936 (speculations in land by a solicitor); *Re Barlow, Ex parte Thornber* (1886), 3 Morr. 304 (gambling, betting, and Stock Exchange transactions by non-trader amounting to rash and hazardous speculations, decided at a time when gambling was not, as it now is, a specific offence); *Re Stainton, Ex parte Board of Trade* (1887), 4 Morr. 242, at p. 252 (speculations in iron); *Re Rankin, Ex parte Rankin* (1887), 5 Morr. 23, where it was held that gambling by a non-trader on the Stock Exchange, amounting to rash and hazardous transactions, is not so bad an offence as speculating with other people's money, as a trader does if he speculates; *Re Tregaskis, Ex parte Tregaskis* (1890), 7 Morr. 193 (speculations by miller in corn options); *Re Angel, Ex parte Angel* (1891), 7 T. L. R. 510 (to the same effect as *Re Rankin, Ex parte Rankin, supra*); and under the present Act *Re Keays, Ex parte Keays* (1891), 9 Morr. 18, *per* KAY, L.J., at p. 24, where it was held that, if a solicitor departs from his ordinary business and enters into building speculations, he runs a very great risk of having this offence established against him, should his building speculations bring on or contribute to his bankruptcy.

As to what does not amount to rash and hazardous speculation, the following cases may be consulted: *Ex parte Wakefield, Re Wakefield* (1850), 4 De G. & Sm. 18 (not "reckless trading" merely because a cotton spinner, when solvent, had engaged in other trades); *Ex parte Evans, Re Barnard and Rosenthal* (1862), 31 L. J. (BCY.) 63 (imprudent trading at a time when the trader was solvent); *Re Downman, Ex parte Downman* (1863), 32 L. J. (BCY.) 49, where Lord WESTBURY, L.C., held on the special facts that the speculations of a company promoter were not rash, though dangerous, and defined a "rash" speculation as a speculation such as no reasonable man would enter into; *Re McCallum* (1866), 14 L. T. 172, where the bankrupt embarked in a business which he understood; and under the repealed s. 28 of the Bankruptcy Act, 1883 (46 & 47 Vict. c. 52), *Re Sultzberger, Ex parte Sultzberger* (1887), 4 Morr. 82, where CAVE, J., at p. 88, said: "'Rash and hazardous' must be looked at with regard to all the circumstances; and if something happens after the purchase has been made to seriously affect its value, it can hardly be said, under ordinary circumstances, that what the purchaser has done is rash and hazardous. Of course where, for example, a purchaser on the Stock Exchange buys largely, simply trusting to a rise, then, if the speculations are large, it may be that they are rash and hazardous; but in this case the goods were bought in the ordinary way of business, and the loss was really owing to the breaking out of the war between Chili and Peru"; *Re Nicholas, Ex parte Nicholas* (1890), 7 Morr. 54, where it was held that it cannot be said that it is rash and hazardous speculation in every case where a man carries on a business which he does not understand, and that the attendant circumstances should be considered; *Re Scharrer* (1888), 4 T. L. R. 627, where the charge was not specific, and merely alleged that the bankrupt carried on an extensive business, and at various places, and alleged that therefore the offence was committed; and under the present section *Re John Brown & Co.* (1906), 22 T. L. R. 291, where it was held that, in order to find a banker guilty of this offence in discounting his customers' trade bills, it would have to be shown that he did not take ordinary and reasonable care in making inquiries as to the pecuniary position of the acceptors.

(*m*) Thus, where the failure of a stockbroker is due to the failure of his clients to indemnify him against loss, it is immaterial to consider whether the transactions, into which he entered for his clients, were purchases for investment or speculations for a rise or fall. In either case, the only liability of the broker is to pay the differences; and, in either case, a broker ought to satisfy himself that his client is in a position to pay the differences or, if he is not satisfied of that, to obtain cover (*Re Jenkins, Ex parte Jenkins* (1891), 8 Morr. 36).

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thereby contributed to his bankruptcy, the court will not accept, as a justification, the apology that his unjustifiable expenditure was necessary, in order to preserve a position and appearance of respectability, so as to obtain business (*n*). The official receiver, however, ought not in his report to take the whole sum expended and divide it by so many years, and thus average a yearly expenditure, especially where the expenditure has been reduced yearly, and has been reduced to a very small amount at the date of the bankruptcy (*o*).

The offence is established, if the extravagance contributed to the bankruptcy, even though it did not bring it about (*p*).

(7) Frivolous or vexatious defences.

428. That the bankrupt has put any of his creditors to unnecessary expense by a frivolous or vexatious defence to any action properly brought against him (*q*).

(8) Frivolous or vexatious actions.

429. That the bankrupt has, within three months preceding the date of the receiving order, incurred unjustifiable expense by bringing a frivolous or vexatious action (*r*).

(9) Undue preference.

430. That the bankrupt has, within three months preceding the date of the receiving order (*s*), when unable to pay his debts as

(*n*) *Re Stevens* (1863), 7 L. T. 649. "A man," said CAVE, J., in *Re Stainton, Ex parte Board of Trade* (1887), 4 Morr. 242, at p. 251, "is bound not to keep up appearances, but to pay his debts, and if his profits will not allow of his living at the particular rate he has been accustomed to live at, then his plain duty is to reduce his scale of living, and not to go on living out of the money of his creditors. As to keeping up the reputation of the business, that again I fail to understand, because it is meant by that, that an intending purchaser, seeing him living at a particular rate, will assume from that that the business is a profitable one, and give more than he otherwise would for the business. That cannot be commended, certainly, as being honest to the purchaser. It is an attempt to delude him by a fictitious appearance of prosperity." It is unjustifiable extravagance for a solicitor who owes £5,000 to live at the rate of £500 a year. (*Ex parte Sparham, Re Sparham* (1864), 9 L. T. 548).

(*o*) *Re Sultzberger, Ex parte Sultzberger* (1887), 4 Morr. 82. For a case of unjustifiable extravagance in living by a non-trader, see *Re Barlow, Ex parte Thornber* (1886), 3 Morr. 304.

(*p*) This has been the law since 1891. For a case under the old law, where it was held that the insolvency was not attributable to extravagance, see *Ex parte Ryley, Re Ryley* (1866), 14 L. T. 707.

(*q*) Bankruptcy Act, 1890 (53 & 54 Vict. c. 71), s. 8 (3) (g). The following cases decided under earlier Acts may be consulted as showing what amounts to a frivolous or vexatious defence: *Re Pownall* (1851), Fonbl. 221 (sham pleas); *Ex parte Blackhurst, Re Blackhurst* (1858), 3 De G. & J. 39, where it was held that a solicitor, who defends an action brought against him by his client for money had and received, ought to show especially good grounds for such a proceeding, not merely grounds which would formerly have been available as a defence in a court of law, but grounds affording a moral justification of the defence. The following cases decided under earlier Acts may be consulted as showing what does not amount to a frivolous or vexatious defence: *Ex parte Johnson, Re Johnson* (1851), 4 De G. & Sm. 25, where the bankrupt pleaded twenty pleas without having any substantial defence, but the defence was really conducted by the bulk of his creditors; *Re R. W. Keene* (1865), 13 W. R. 475, where the bankrupt was advised by counsel and believed that he was justified in resisting the claim.

(*r*) Bankruptcy Act, 1890 (53 & 54 Vict. c. 71), s. 8 (3) (h).

(*s*) Not, as under s. 48 of the Bankruptcy Act, 1883 (46 & 47 Vict. c. 52) (see p. 280, *post*), within three months of the petition on which the adjudication took place.

they become due (*t*), given an undue preference (*u*) to any of his creditors (*a*).

The question which the court has to consider is the conduct of the bankrupt; and the court in considering it must inquire whether what the bankrupt has done was merely accidental, or whether he acted deliberately, knowing what he was doing. The object of the Legislature in creating this offence is disciplinary: to punish a bankrupt who, when unable to pay his debts as they become due, gives a preference to one of his creditors. The duty of a man in that position is not to prefer one of his creditors over the others. If he does so, it may be that there has been no completed transaction, which would have been avoided as a fraudulent preference if completed; but the court can nevertheless punish him for the inchoate act (*b*).

How far punishable.

It is very dangerous for a trader, at a time when he is unable to pay his debts as they become due, to take upon himself to distribute his estate, and to pay creditors, even though they be creditors who would be entitled to preferential payment in bankruptcy, thus depriving the trustee of the property of the bankrupt in the inevitable bankruptcy, which will shortly take place, of the power of determining whether those debts are really due. Certainly, if a person in that position pays a creditor in full during the three months before the receiving order, because he has received services from or is a friend of that creditor, he commits the above offence, unless it is absolutely certain that such creditor would in the bankruptcy have been paid before the others (*c*).

Distribution of property by trader in anticipation of bankruptcy.

431. That the bankrupt has within three months preceding the date of the receiving order incurred liabilities with a view of making his assets equal to ten shillings in the pound on the amount of his unsecured liabilities (*d*).

(10) Incurring liabilities with view of increasing assets.

432. That the bankrupt has on any previous occasion been adjudicated bankrupt (*e*) or made a composition or arrangement with his creditors (*f*).

(11) Previous bankruptcy etc.

(*t*) For the distinction between such an inability and insolvency, see note (*n*), p. 253, *ante*.

(*u*) Bankruptcy Act, 1890 (53 & 54 Vict. c. 71), s. 8 (3) (i).

(*a*) "Undue preference" includes all that is included in s. 48 of the Bankruptcy Act, 1883 (46 & 47 Vict. c. 52); but it includes more (*Re Skegg, Ex parte Skegg* (1890), 25 Q. B. D. 505). As to fraudulent preference, see p. 279, *post*.

(*b*) *Re Skegg, Ex parte Skegg, supra*, decided under the repealed s. 28 (3) (f) of the Bankruptcy Act, 1883 (46 & 47 Vict. c. 52), which is in the same terms as the present s. 8 (3) (i) of the Bankruptcy Act, 1890 (53 & 54 Vict. c. 71).

(*c*) *Re Bryant, Ex parte Bryant*, [1895] 1 Q. B. 420.

(*d*) Bankruptcy Act, 1890 (53 & 54 Vict. c. 71), s. 8 (3) (j). Such a case would arise, for instance, where a debtor whose liabilities amounted to £1000 borrowed an additional £10,000 and retained it in hand; in which event his assets might amount to £10,000, and his liabilities to £11,000.

(*e*) It has been held that the offence is established although a prior bankruptcy under an old Bankruptcy Act had been annulled with the consent of the creditors; and also that an annulment of a former bankruptcy under s. 23 of the Bankruptcy Act, 1883 (46 & 47 Vict. c. 52), does not have the effect of preventing it being a previous adjudication within the meaning of the provision (*Re Denny* (1905), 21 T. L. R. 297). An application for an order of discharge by a bankrupt who has not yet obtained his discharge under an earlier bankruptcy may be adjourned *sine die* (*Re Binko* (1885), 1 T. L. R. 239).

(*f*) Bankruptcy Act, 1890 (53 & 54 Vict. c. 71), s. 8 (3) (k).

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(12) Fraud or fraudulent breach of trust.

433. That the bankrupt has been guilty of any fraud or fraudulent breach of trust (*g*).

Fraudulent misrepresentation.

A fraudulent misrepresentation is proved, when it is shown that a false representation has been made knowingly, or without belief in its truth, or recklessly, without caring whether it is true or false (*h*). Concealment of material facts may, if dishonest, amount to fraud (*i*).

False impression from true statements.

If by a number of statements a person intentionally gives a false impression and induces a person to act on it, it is not the less false although, if one takes each statement by itself, there may be a difficulty in showing that any specific statement is untrue (*k*). Further, language may be used in such a way that, although in the form of hope and expectation, it may become a representation as to facts; and if so, and if it is known to the person using that language that these facts do not exist, it is a fraud (*l*). It is none the less a fraud, if the person who is guilty of the fraud gives his victim constructive notice of a document, the perusal of which would have exposed the fraud (*m*).

Secret profits.

A person in the position of a trustee or agent or in any other fiduciary position is accountable for all secret profits made by him directly or indirectly out of his fiduciary position. The retention of such profits, if the concealment was dishonest, is a fraud and fraudulent breach of trust (*n*).

Purchases on credit.

Bankrupts will be visited with the utmost severity when they

(*g*) Bankruptcy Act, 1890 (53 & 54 Vict. c. 71), s. 8 (3) (l).

(*h*) *Derry* v. *Peek* (1889), 14 App. Cas. 337, at p. 374. In *Re Duce & Duce, Ex parte James Duce* (1889), 6 Morr. 290, the Divisional Court held that the county court judge was fully justified in absolutely refusing the discharge, where the bankrupt had knowingly put forward false statements in a prospectus; and (*per* CHARLES, J.) that, even if he had not knowledge of the true facts, it was a fraudulent act for a man for his own advantage to issue a statement which is false in fact, being utterly careless of whether it was true or not.

(*i*) *Cavendish Bentinck* v. *Fenn* (1887), 12 App. Cas. 652 (where it was held on the facts that there was no fraud); *Re Leeds and Hanley Theatres of Varieties, Ltd.*, [1902] 2 Ch. 809. See also *Gluckstein* v. *Barnes*, [1900] A. C. 240.

(*k*) *Aaron's Reefs, Ltd.* v. *Twiss*, [1896] A. C. 273, *per* Lord HALSBURY, L.C., at p. 281. See also *McConnel* v. *Wright*, [1903] 1 Ch. 546, at p. 551.

(*l*) *Aaron's Reefs, Ltd.* v. *Twiss*, *supra*, *per* Lord HALSBURY, L.C., at p. 284.

(*m*) *Ibid.*, *per* Lord WATSON, at p. 287.

(*n*) The trustee or agent is liable to account whether his conduct has been honest or dishonest. But there is no fraud or fraudulent breach of trust, unless the trustee or agent has been dishonest, that is, fraudulent in the popular and true meaning of the word (*Parker* v. *McKenna* (1874), 10 Ch. App. 96, and *Derry* v. *Peek* (1889), 14 App. Cas. 337). The observations of Sir G. JESSEL, M.R., in *Emma Silver Mining Co.* v. *Grant* (1880), 17 Ch. D. 122, at p. 128, are too wide, if they were intended to assert that every case of the retention of a secret profit by a person in a fiduciary position is a fraud, whether the retention is honest or dishonest. In that case Sir G. JESSEL held that a company promoter who had made a secret profit was guilty of "fraud" and "breach of trust," and that the debt incurred to the company was a debt incurred by "fraud" and "breach of trust" within the meaning of s. 49 (a) of the Bankruptcy Act, 1869 (32 & 33 Vict. c. 71), and therefore not released by an order of discharge in a liquidation by arrangement. See also *Ramskill* v. *Edwards* (1885), 31 Ch. D. 100, as to liabilities "incurred by means of a breach of trust." Sect. 30 (1) of the Bankruptcy Act, 1883 (46 & 47 Vict. c. 52), as to the effect of discharge (see p. 270, *post*), refers to debts or liabilities "incurred by means of any fraud or fraudulent breach of trust to which he was a party."

have been trading with a fraudulent intention, as when they have purchased goods on credit for the purpose of pledging them (*o*); but the circumstances of particular cases may negative fraudulent intention (*p*). Where a trader buys goods on credit to a great extent and over a long period, and sells them under cost price, the inference is irresistible that the credit given to the bankrupt proceeded on the belief of those from whom he purchased the goods—a belief which they are allowed by the trader to entertain—that the goods would be sold at a profit in the ordinary course of trade. This is a direct fraud on those from whom the trader purchased the goods (*q*).

The courts have always been careful to distinguish between cases which are tainted with fraud or dishonesty and those which are affected merely by extravagance or carelessness. Culpable and vicious as wild and hazardous speculations are, and therefore deserving of punishment, they must be distinguished from cases of positive fraud (*r*).

(*o*) *Ex parte Martyn, Re Martyn* (1852), 2 De G. M. & G. 225, *per* Lord CRANWORTH, L.J., at p. 228, in which case it was held that there was no fraudulent intention.

(*p*) As where goods are bought on credit in the usual course of trade and are subsequently pledged owing to a sudden pressure (*Ex parte Martyn, supra*). See also *Ex parte Manico, Re Manico* (1853), 3 De G. M. & G. 502.

(*q*) *Ex parte Coleman, Re Coleman* (1858), 3 De G. & J. 43. Compare *Ex parte Holthouse, Re Holthouse* (1851), 1 De G. M. & G. 237, where Lord CRANWORTH, L.J., said it would be difficult to frame a definition of fraud which would not include such conduct as that of systematically buying goods on credit for the purpose of selling them under cost price. See also p. 255, *ante*.

(*r*) *Ex parte Brown, Re Brown* (1858), 3 De G. & J. 369, *per* TURNER, L.J., at p. 373. As to frauds by traders, see that case and *Ex parte Dobson, Re Strong* (1855), 6 De G. M. & G. 781, where the bankrupt had abstracted property from his creditors and had given a false account of the disposal of it; *Ex parte Simond, Re Simond* (1857), 26 L. J. (BCY.) 49, where it was held on the evidence of custom that there is an implied representation by the purchaser of foreign bills that the purchaser has the means of meeting them; *Ex parte Laurence, Re Laurence* (1861), 30 L. J. (BCY.) 33, where a trader discounted accommodation bills representing that they were trade bills; *Ex parte Johnson, Re Johnson* (1861), 30 L. J. (BCY.) 38, where the bankrupt fraudulently "salted" invoices to obtain a loan, and where TURNER, L.J., at p. 41, said that an alleged trade custom of "salting" invoices would be treated as fraudulent by the court.

In the following cases it was held that there was no fraud within the meaning of the repealed s. 28 (3) (h) of the Bankruptcy Act, 1883 (46 & 47 Vict. c. 52), which was in the same terms as the present s. 8 (3) (l) of the Bankruptcy Act, 1890 (53 & 54 Vict. c. 71): *Re Du Boulay* (1885), 2 Morr. 49, where bills were given in respect of sugar to come forward, and but for a fall in sugar there were ample means to meet the bills; *Re Dowson, Ex parte Dowson* (1887), 4 Morr. 311 (which shows what course should be taken where the judge discovers that he was mistaken in finding fraud and wishes to review his decision); *Re Freeman, Ex parte Freeman* (1890), 7 Morr. 38, at p. 45, where it was held that, if a trustee commits a breach of trust involving no dishonourable conduct, as where, at the solicitation of his *cestui que trust*, he invests in a class of security not warranted by the deed of trust, such conduct ought not to be taken into account in considering whether the trustee, if he subsequently becomes bankrupt, ought or ought not to have his discharge; *Re Cranston, Ex parte Cranston* (1892), 9 Morr. 160, where the bankrupt, being in difficulties, sold goods below their value to raise money to defend an action and also for the support of his family.

In the following cases it was held that fraud had been committed within the

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(13) Fraudulent settlements.

434. That the bankrupt has made a settlement before and in consideration of marriage at a time when he was not able to pay all his debts without the aid of the property comprised in the settlement, or has made a covenant or contract in consideration of marriage for the future settlement on or for the settlor's wife or children of any money or property in which he had not at the date of his marriage any estate or interest (not being money or property of or in right of his wife), and it appears to the court in either of the above cases that such settlement, covenant, or contract was made in order to defeat or delay creditors, or was unjustifiable having regard to the settlor's affairs at the time when it was made (*s*).

Costs.

435. A bankrupt is not entitled to have any of the costs of, or incidental to, his application for his discharge allowed to him out of his estate (*t*); but this rule does not apply to the bankrupt's costs of a successful appeal by him against an order made on his application for an order of discharge (*a*).

The court has jurisdiction to order an undischarged bankrupt to pay the costs of a successful appeal against the order of discharge by a person aggrieved (*b*).

SUB-SECT. 4.—*Exercise of the Court's Discretion in Cases within the statutory Limitations.*

Principles governing court's exercise of discretion.

436. In cases within the statutory limitations the court has an almost unlimited discretion as to the order which it will make (*c*). The broad principles, however, on which its jurisdiction ought to be exercised have been from time to time indicated by judicial decisions.

The overriding intention of the Legislature in all Bankruptcy Acts is that the bankrupt on giving up the whole of his property shall be a free man again, able to earn his livelihood, and having the ordinary inducements to industry (*d*).

Interests of the public and commercial morality.

In considering an application for discharge, the court will have regard, not to the interests of the creditors alone, but also to the

meaning of s. 28 (3) (h) of the Bankruptcy Act, 1883 (46 & 47 Vict. c. 52): *Re Badcock, Ex parte Badcock* (1886), 3 Morr. 138 (absolute refusal by reason of fraudulent breach of trust); *Re Duce & Duce, Ex parte James Duce* (1889), 6 Morr. 290 (absolute refusal by reason of fraudulent prospectus).

(*s*) Bankruptcy Act, 1883 (46 & 47 Vict. c. 52), s. 29. In such a case the court may refuse or suspend an order of discharge or grant an order subject to conditions in like manner as in cases where the bankrupt has been guilty of fraud (*ibid.*).

(*t*) Bankruptcy Rules, r. 239.

(*a*) *Re Nicholas, Ex parte Nicholas* (1890), 7 Morr. 54.

(*b*) *Ex parte Castle Mail Packets Co., Re Payne* (1886), 18 Q. B. D. 154.

(*c*) *Re Barker, Ex parte Constable, and Re Jones, Ex parte Jones* (1890), 7 Morr. 111, 117.

(*d*) *Re Gaskell*, [1904] 2 K. B. 478, *per* VAUGHAN WILLIAMS, L.J., at p. 482. The reason why an undischarged bankrupt is entitled to retain his personal earnings is that he must be allowed to support himself and those whom it is his legal duty to support, and that he cannot be converted into a mere slave or personal chattel of his creditors (*Re Hawkins, Ex parte Official Receiver*, [1892] 1 Q. B. 890, *per* VAUGHAN WILLIAMS, J., at p. 893).

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interests of the public and commercial morality (*e*). Thus, where gross misconduct has been proved, which prevents the granting of an immediate and unconditional order of discharge, an order of discharge may be refused altogether, although the bankrupt has not been guilty of any of the specified crimes which compel the court to refuse an order of discharge absolutely except for special reasons (*f*).

Interference with discretion by Court of Appeal.

437. On the other hand, where facts are proved which fetter the discretion of the court, but its discretion has been exercised within the statutory limits as to the terms upon which a bankrupt shall be discharged, the Court of Appeal will not interfere with such exercise of discretion on the ground that it has been too lenient, unless a clear case is made out that the decision of the court below was wrong (*g*).

Wrong reasons.

But where the reasons assigned by the court below for coming to the conclusion that a bankrupt has not been guilty of misconduct are illusory, or such as the Court of Appeal can see to be wrong, it is the duty of the Court of Appeal to do what the court below should have done (*h*). So also if the court below bases its decision solely on the report of the official receiver, and it is proved on appeal that the statements in the report are unfounded in fact, or are capable of a satisfactory explanation, the Court of Appeal will deal with the case on the true state of facts (*i*).

Wrong view of facts.

Where the Court of Appeal disagrees with the conclusion of fact formed by the court below, it cannot take into account the exercise by the court below of its discretion upon a view of facts which it holds to be erroneous, and is in no way fettered by the amount of the sentence which the court below has thought fit to pass, and may absolutely refuse an order of discharge, although the court below merely suspended it. But where the Court of Appeal agrees with the view of the court below on the facts, it would require a very strong case to induce it to interfere (*k*) when an appeal is only brought against the mildness of the decision.

Review, rescission etc. of orders.

438. Apart from the special provision as to the modification of the terms of an order of discharge after the expiration of two years (*l*),

(*e*) *Re Badcock, Ex parte Badcock* (1886), 3 Morr. 138.
(*f*) *Ibid.*
(*g*) *Re Chase, Ex parte Cooper* (1886), 3 Morr. 228.
(*h*) *Re Stainton, Ex parte Board of Trade* (1887), 4 Morr. 242.
(*i*) *Re Sultzberger, Ex parte Sultzberger* (1887), 4 Morr. 82.
(*k*) *Ex parte Castle Mail Packets Co., Re Payne* (1886), 18 Q. B. D. 154. On the other hand, where the facts are not in dispute, the Court of Appeal will mitigate the punishment if it is unduly severe (*Re Rankin, Ex parte Rankin* (1887), 5 Morr. 23). In the latter case the bankrupt had been guilty of rash and hazardous speculations, and the county court judge had refused the discharge absolutely. The bankrupt was not a trader. The Divisional Court suspended the order of discharge for three years. Had the bankrupt been a trader, the Divisional Court would not have interfered with the discretion of the court below (*ibid.*, at p. 25). But even in the case of a trader who had incurred trade debts amounting to £250 with a knowledge of insolvency the Divisional Court reduced the period of suspension from five years to two years in the special circumstances, and intimated that a suspension for five years should be reserved for very bad cases (*Re Swabey, Ex parte Swabey* (1897), 76 L. T. 534).
(*l*) See s. 8 (2) of the Bankruptcy Act, 1890 (53 & 54 Vict. c. 52), and p. 267, *post.*

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every court having jurisdiction in bankruptcy may review, rescind, or vary any order made by it under its bankruptcy jurisdiction (*m*). The court has a discretion of the widest and most far-reaching character.

One general, but not invariable, rule is that the court should not grant a rehearing where the only object of the applicant is to obtain another opportunity for appealing, when he has let the time for appealing go by. But since the refusal of an order of discharge operates as a punishment on the bankrupt, there is no reason why the punishment should not be remitted at any distance of time, if it can be shown that the object of the punishment has been effected.

An application for review is not confined to the evidence which was before the court on the original application. The court may take into consideration the conduct of the bankrupt since the date of the original order, and may, if it thinks that the bankrupt has been sufficiently punished, grant an absolute order of discharge (*n*). The bankrupt cannot, where the discharge is absolutely refused, apply *de novo* as a matter of right (*o*).

Further consideration.

Where a judge from facts subsequently brought to his notice comes to the conclusion that the order made was unduly severe, and expresses a desire that his decision should be further considered, and in the meantime the bankrupt has appealed, the proper course is to order the appeal to stand over, in order that an application may be made to the judge to review his decision (*p*).

(*m*) Bankruptcy Act, 1883 (46 & 47 Vict. c. 52), s. 104 (1). As to appeals in general, see p. 301, *post*.

(*n*) *Re Tobias & Co., Ex parte H. A. Tobias*, [1891] 1 Q. B. 463, 8 Morr. 30, explaining *Re Lloyd, Ex parte Lloyd* (1889), 6 Morr. 297.

(*o*) *Re Tobias & Co., Ex parte H. A. Tobias, supra, per* CAVE, J., at p. 465. For other cases decided under s. 104 (1) of the Bankruptcy Act, 1883 (46 & 47 Vict. c. 52), and apart from the special proviso of s. 8 (2) of the Bankruptcy Act, 1890 (53 & 54 Vict. c. 71), see *Re Tregaskis, Ex parte Tregaskis* (1889), 7 Morr. 193, where, the original order having been wrongly made, but the bankrupt, who had not been represented by counsel or solicitor, not having appealed, on a subsequent application by him to the court to review, rescind, or vary the original order by expunging the conditions on which it had been granted on the ground that, in the then state of the law, there was no power to make a conditional order and to suspend the order concurrently, the Divisional Court held that the county court had jurisdiction under s. 104 (1) of the Bankruptcy Act, 1883, to rehear, and remitted the case to the county court judge for him to consider the whole of the circumstances and the mistake that had been made and to make such order as he should think fit in the circumstances; *Re Durnford* (1895), 2 Mans. 521, where a conditional order having been granted in 1885, the bankrupt to pay any surplus of earnings and income over £200 a year to his trustee in bankruptcy, the bankrupt, in spite of great efforts during ten years, was unable to earn any substantial surplus over the £200 a year, and the Divisional Court held that the pecuniary interests of the creditors ought not to prevent the making of an order which the interests of the State demanded and the debtor had earned, and granted the bankrupt an immediate discharge freed from the conditions imposed by the old order.

Where a bankrupt has committed one of the crimes specified in s. 8 (2) of the Bankruptcy Act, 1890 (53 & 54 Vict. c. 71), the court may consider as "special reasons" for not refusing the application any circumstances mitigating the offence, including the debtor's subsequent conduct (*Re Solomons*, [1904] 1 K. B. 106).

(*p*) *Re Dowson, Ex parte Dowson* (1887), 4 Morr. 310.

SUB-SECT. 4. Exercise of Court's Discretion.

Appeals.

439. Any order made on the application of the bankrupt for an order of discharge or on an application to modify, review, rescind, or vary such an order is subject to appeal (*q*) at the instance of the Board of Trade, or the trustee of the property of the bankrupt, if any (*r*), or of any person aggrieved (*s*). The notice of appeal is a fourteen days' notice (*t*), and, subject to the power of the court to extend the time under special circumstances, no appeal can be brought after the expiration of twenty-one days from the date on which the order is passed and entered (*u*).

If the official receiver or the trustee of the property of the bankrupt appears to oppose an appeal, creditors who are served with notice of the appeal by the bankrupt from an order made on his application for an order of discharge may appear, but, if they appear, do so at their own expense (*a*).

SUB-SECT. 5.—*Procedure after the Hearing of the Application and Order.*

Form and contents of order.

440. The statutory forms of order provide for recitals showing what facts have and what facts have not been proved. It is the duty of the court where an immediate unconditional order of discharge is refused to find that the facts existed upon which the discharge is to be refused or suspended or granted conditionally, and to fill up the appropriate statutory form in such a manner that it may be known in what respects the bankrupt has not complied with the law (*b*). Where the court below neglects to comply with the requirements of the law in this respect, the Court of Appeal will either form its own conclusion on the facts brought before it and exercise its own discretion (*c*), or remit the case to the court below to make the order in or in accordance with the appropriate statutory form (*d*).

Dating and completion of order.

The order of the court made on an application for discharge

(*q*) See, as to appeals generally, p. 301, *post*. As to the interference by the Court of Appeal with the discretion of the court below, see p. 263, *ante*.

(*r*) Bankruptcy Rules, r. 237. This rule is *intra vires* (*Re Stainton, Ex parte Board of Trade* (1887), 19 Q. B. D. 182).

(*s*) Bankruptcy Act, 1883 (46 & 47 Vict. c. 52), s. 104 (2). The bankrupt, of course, may be a "person aggrieved." An unpaid creditor is a "person aggrieved" by an order of discharge improperly made (*Ex parte Castle Mail Packets Co., Re Payne* (1886), 18 Q. B. D. 154. As to service of notice of appeal, see Bankruptcy Rules, r. 134; R. S. C., Ord. 58, r. 2; *Re Carne, Ex parte Jackson* (1889), 6 Morr. 55.

(*t*) Bankruptcy Rules, r. 134; R. S. C., Ord. 58, r. 3. When, insufficient notice having been given, objection was taken at the hearing, the Court of Appeal ordered the appeal to stand over until the necessary time had expired (*Re Landau, Ex parte Brown and Wingrove* (1887), 4 Morr. 253).

(*u*) Bankruptcy Rules, r. 130; *Re Helsby*, [1894] 1 Q. B. 742. As to what are special circumstances, see note (*a*), p. 305, *post*.

(*a*) *Ex parte Salaman, Re Salaman* (1885), 14 Q. B. D. 936, *per* BRETT, M.R., at p. 949.

(*b*) *Re Oswell, Ex parte Board of Trade* (1892), 9 Morr. 202.

(*c*) *Re Nicholas, Ex parte Nicholas* (1890), 7 Morr. 54, where the county court judge refused the discharge absolutely, but had not filled up the form so as to show his reasons for the refusal, and the Divisional Court, in the exercise of its discretion on the facts before it, suspended the discharge for two years and ordered that the costs of all parties, including the costs of the bankrupt, should come out of the estate.

(*d*) *Re Oswell, Ex parte Board of Trade* (1892), 9 Morr. 202.

SUB-SECT. 5. Procedure after Hearing of Application.

must be dated as of the day on which it is made, and takes effect from the day on which the order is drawn up and signed (*e*). If within one week from the making of the order such order has not been completed, it is the duty of the registrar to prepare and complete it, unless the judge otherwise orders (*f*). Where, however, an order of discharge is granted subject to the condition that judgment shall be entered against the bankrupt, the registrar is not required to prepare and complete the order until the bankrupt has given his consent in the prescribed form to judgment being entered against him (*f*).

Gazetting of order.

The order of the court made on an application for discharge must not be delivered out or gazetted until after the expiration of the time allowed for appeal, or, if an appeal be entered, until after the decision of the Court of Appeal on the appeal (*g*).

When the time for appeal has expired, or, as the case may be, when the appeal has been decided by the Court of Appeal, the senior bankruptcy registrar of the High Court, or in a county court the registrar, forthwith sends notice of the order to the Board of Trade, who gazette it (*h*).

Revocation.

441. Apart from the powers of modification, rescission, review, and rehearing above referred to, the court may, on the application of the official receiver or trustee of the property of the bankrupt, if the bankrupt does not give the required consent to judgment being entered against him within one month of the making of a conditional order under which that consent is necessary, revoke the order or make such other order as the court thinks fit (*i*). The court, however, must not repeat the original order and thus suspend the discharge indefinitely. On the other hand, when the order is revoked, the bankrupt cannot dictate to the court that the only order to be made is a suspension of his discharge for two years (*k*).

Rescission.

Where a bankrupt, who has obtained a discharge conditional on his accounting for his after-acquired property, neglects to file the prescribed affidavit as to after-acquired property or income, or to attend the court for examination when required so to do, or properly to answer all such questions as the court may put or allow to be put to him, the court may, on the application of the official receiver or the trustee of the property of the bankrupt, rescind the order of discharge (*l*).

(*e*) Bankruptcy Rules, r. 241. The order must be in one of the Forms Nos. 62, 62 a, 62 b, 63, 63 a, as the case may require (*ibid.*, and Bankruptcy Rules, 1891, r. 1).

(*f*) Bankruptcy Rules, r. 37 A. A person who has the carriage of an order must obtain from the registrar an appointment to settle it, and give reasonable notice of the appointment to all persons who may be affected by it, or to their solicitors (*ibid*, r. 37 B).

(*g*) *Ibid.*, r. 241. As to time allowed for appeal, see p. 265, *ante.*

(*h*) *Ibid.*, r. 242.

(*i*) *Ibid.*, r. 240 (3).

(*k*) *Re Gaskell*, [1904] 2 K. B. 478. When the court grants a conditional order of discharge in the terms of Form No. 63 a, the condition of the bankrupt's discharge is not only his consent to judgment, but also the due performance of the judgment. Hence, if the bankrupt fails without reasonable cause to pay the instalments, the court can revoke the order of discharge under s. 104 of the Bankruptcy Act, 1883 (46 & 47 Vict. c. 52) (*Re Summers, Ex parte Official Receiver*, [1907] 2 K. B. 166).

(*l*) Bankruptcy Rules, r. 244 A; and see p. 268, *post.*

SUB-SECT. 5. Procedure after Hearing of Application.

442. If the bankrupt, at any time after the expiration of two years from the date of any order made on his application for an order of discharge, satisfies the court that there is no reasonable probability of his being in a position to comply with the terms of the order, the court may modify the terms of the order or of any substituted order in such manner and upon such conditions as it may think fit (*m*).

Modification after two years.

An application to modify the terms of a conditional order ought to be made by the bankrupt himself, and not by his trustee in bankruptcy (*n*).

Application to modify order.

The bankrupt is not precluded from making the application by the fact that he has failed to comply with the requirements with regard to information and statements as to his after-acquired property, earnings, and income (*o*).

On such an application the first thing which the court has to consider is whether there is no reasonable probability of the bankrupt being able to comply with the conditions of the order of discharge. Those conditions are intended for the benefit of the creditors, and the court ought not to leave that out of consideration in the exercise of its discretion (*p*).

No reasonable probability of conditions being fulfilled.

SUB-SECT. 6.—*Effect of the Order generally.*

443. A discharged bankrupt is bound, notwithstanding his discharge, to give such assistance as the trustee of the property of the bankrupt may require in the realisation and distribution of such of his property as is vested in the trustee, and if he fails to do so, he is guilty of a contempt of court; and the court may also, if it thinks fit, revoke his discharge, but without prejudice to the validity of any sale, disposition, or payment duly made or thing duly done subsequent to the discharge but before its revocation (*q*).

Duties of discharged bankrupt.

444. The subsequent salary or income of the bankrupt does not continue to be vested in his trustee, unless there is an order of the court upon the bankrupt to pay over a portion of his salary or income notwithstanding the discharge (*r*).

Right to subsequent income.

Where a bankrupt is discharged subject to the condition that judgment shall be entered against him, or subject to any other

Accounts of earnings and after-acquired property.

(*m*) Bankruptcy Act, 1890 (53 & 54 Vict. c. 71), s. 8 (2). See *Re Durnford* (1895), 2 Mans. 521. The bankrupt is required to give fourteen days' notice of the day fixed for hearing the application to the official receiver and to all his creditors (Bankruptcy Rules, r. 244 B).

(*n*) *Re John Roberts & Co., Ex parte Bonzoline Manufacturing Co.*, [1904] 2 K. B. 299.

(*o*) *Re John Roberts & Co., Ex parte Bonzoline Manufacturing Co., supra.* See Bankruptcy Rules, r. 244, and note (*l*), p. 266, *ante*.

(*p*) *Re John Roberts & Co., supra, per* VAUGHAN WILLIAMS, L.J., at p. 304.

(*q*) Bankruptcy Act, 1890 (53 & 54 Vict. c. 71), s. 8 (8). See also Bankruptcy Act, 1883 (46 & 47 Vict. c. 52), ss. 24, 27, as to the discovery and realisation of property and the duties of the bankrupt in reference thereto. A registrar has no power to commit for contempt of Court (*ibid.*, s. 99 (4)). See also Bankruptcy Rules, rr. 85—88, as to the practice, and *ibid.*, Appendix, Forms, Nos. 153 *et seq.* As to the duties of a bankrupt after the making of a conditional order, see note (*i*), p. 249, *ante*.

(*r*) *Re Gold, Ex parte Gold* (1891), 8 Morr. 45, *per* VAUGHAN WILLIAMS, J., at p. 48.

SUB-SECT. 6. Effect of Order generally.

condition as to his future earnings or after-acquired property, it is his duty, until such judgment or condition is satisfied, from time to time to give to the official receiver such information as he may require with respect to his earnings and after-acquired property and income, and not less than once a year to file in the court a statement showing the particulars of any property or income he may have acquired subsequent to his discharge (*s*).

Verification by affidavit.

Any statement of after-acquired property or income filed by a bankrupt whose discharge has been granted subject to conditions must be verified by affidavit, and the official receiver or trustee may require the bankrupt to attend before the court to be examined on oath with reference to the statements contained in the affidavit, or as to his earnings, income, after-acquired property, or dealings (*a*).

Freedom to contract.

445. Generally, it may be said that the effect of an order of discharge is to enable the bankrupt to contract freely and to acquire property, and his trustee in bankruptcy will have no right of intervention.

A bankrupt who has obtained his discharge is freed from the statutory restriction (*b*) peculiar to undischarged bankrupts which provides that, where an undischarged bankrupt, who has been adjudged bankrupt under the present Act (*c*), obtains credit to the extent of £20 or upwards from any one person without informing him that he is an undischarged bankrupt, he shall be guilty of a misdemeanour, and may be dealt with and punished as if he had been guilty of a misdemeanour under the Debtors Act, 1869 (*d*), and can be prosecuted under that Act (*e*).

(*s*) Bankruptcy Rules, r. 244. Non-compliance with the requirements of this rule does not debar the bankrupt from applying to the court to modify the conditions of the order of discharge under s. 8 (2) of the Bankruptcy Act, 1890 (53 & 54 Vict. c. 71). See note (*m*), p. 267, *ante*.

(*a*) Bankruptcy Rules, r. 244 A. The affidavit must be in Form No. 65 b, with such variations as circumstances may require. For consequences of non-compliance with this provision, see p. 266, *ante*.

(*b*) Imposed by Bankruptcy Act, 1883 (46 & 47 Vict. c. 52), s. 31.

(*c*) Bankruptcy Act, 1883 (46 & 47 Vict. c. 52).

(*d*) 32 & 33 Vict. c. 62. See ss. 16—20, 23, of that Act, and ss. 164—167 of the Bankruptcy Act, 1883 (46 & 47 Vict. c. 52). See also pp. 345 *et seq.*, *post*.

(*e*) As to the effect of s. 31 of the Bankruptcy Act, 1883 (46 & 47 Vict. c. 52), see pp. 350, 351, *post*, and the following cases: *R.* v. *Peters* (1886), 16 Q. B. D. 636, where it was held that if an undischarged bankrupt obtains goods to the amount of £20 on credit without saying that he is an undischarged bankrupt, he comes not only within the words, but within the mischief, of the Act, although there is no stipulation for credit, and although the goods are not obtained on a specific contract to give credit; *R.* v. *Jones*, [1898] 1 Q. B. 119, where a man who ordered a meal in a restaurant, not having the means to pay for it, was held liable to be convicted of having incurred a debt and obtained credit by fraud within the meaning of s. 13 (i) of the Debtors Act, 1869 (32 & 33 Vict. c. 62); *R.* v. *Dyson*, [1894] 2 Q. B. 176, where it was held that the offence may be complete whether or not the bankrupt had an intent to defraud; *R.* v. *Juby* (1886), 55 L. T. 788, where the court held that there was evidence to go to the jury, where the undischarged bankrupt retained goods delivered to him of the value of over £20, although he had only ordered goods of the value of under £20; *R.* v. *Turner*, [1904] 1 K. B. 181, where the court held that the class of offence dealt with by s. 31 of the Bankruptcy Act, 1883 (46 & 47 Vict. c. 52), is more analogous to the offences dealt with by s. 13 of the Debtors Act, 1869

SUB-SECT. 6. **Effect of Order generally.**

446. No disqualification arising by virtue of the Bankruptcy Act, 1883 (*f*), will continue for more than five years from the date of any discharge which is granted under and by virtue of that Act or of the Bankruptcy Act, 1890 (*g*).

Continuance of disqualifications.

447. An order of discharge is conclusive evidence of the bankruptcy and of the validity of the proceedings in the bankruptcy (*h*).

Conclusive as to validity of bankruptcy.

Release from provable debts.

448. An order of discharge, except in the cases mentioned below, has the effect of releasing the bankrupt from all debts provable in bankruptcy (*i*), even although the creditor is the Crown (*k*); and a promise to pay a debt barred by an order of discharge without fresh consideration is *nudum pactum* (*l*).

In any proceedings that may be instituted against a bankrupt who has obtained an order of discharge in respect of any debt from which he is released by the order, he may plead that the cause of action occurred before his discharge, and may give the Bankruptcy Act, 1883, and the special matter in evidence (*m*).

Debts not released by discharge. Damages for seduction etc.

449. An order of discharge will not release the bankrupt from any liability under a judgment against him in an action for seduction, or under an affiliation order, or under a judgment against him as a co-respondent in a matrimonial cause, except to such an extent and under such conditions as the court expressly orders in respect of such liability (*n*).

Revenue debts etc.

Nor will an order of discharge release the bankrupt from any debt on a recognisance, or from any debt with which the bankrupt

(32 & 33 Vict. c. 62), than to those dealt with by s. 11 of that Act, and that therefore the bankrupt was not liable to a greater sentence than twelve months' imprisonment with hard labour.

(*f*) See Bankruptcy Act, 1883 (46 & 47 Vict. c. 52), s. 32, p. 88, *ante*.

(*g*) 53 & 54 Vict. c. 71. The above provision is contained in s. 9 of that Act, which also declares that the disqualifications arising by virtue of s. 32 of the Bankruptcy Act, 1883 (46 & 47 Vict. c. 52), include disqualification for being elected to, or holding or executing the office of a member of, a county council.

(*h*) Bankruptcy Act, 1883 (46 & 47 Vict. c. 52), s. 30 (3).

(*i*) *Ibid.*, s. 30 (2). As to what debts are and are not provable in bankruptcy, see *ibid.*, ss. 37, 168, and pp. 197 *et seq.*, *ante*. As to the right to sue the bankrupt after his discharge on a covenant to assign after-acquired property contained in a marriage settlement not being ancillary to a debt released by an order of discharge, and where there was no evidence of any breach of the covenant before the bankruptcy was closed, see *Re Reis, Ex parte Clough*, [1904] 2 K. B. 769, affirmed *sub nom. Clough* v. *Samuel*, [1905] A. C. 442, distinguishing *Collyer* v. *Isaacs* (1881), 19 Ch. D. 342, and *Hardy* v. *Fothergill* (1888), 13 App. Cas. 351.

(*k*) The Bankruptcy Act, 1883 (46 & 47 Vict. c. 52), expressly provides by s. 150 that, save as therein provided, its provisions relating to the effect of a discharge shall bind the Crown.

(*l*) *Heather & Son* v. *Webb* (1876), 2 C. P. D. 1, approving *Jones* v. *Phelps* (1871), 20 W. R. 92. But an agreement entered into after discharge to pay one of the creditors in full in consideration of the creditor agreeing to supply further goods is a valid agreement, and will support an action (*Jakeman* v. *Cook* (1878), 4 Ex. D. 26, approved by Lord SELBORNE, L.C., in *Ex parte Barrow, Re Andrews* (1881), 18 Ch. D. 464, at p. 470). As to the effect of bargains with creditors before discharge, see also pp. 258, 259, *ante*.

(*m*) Bankruptcy Act, 1883 (46 & 47 Vict. c. 52), s. 30 (3).

(*n*) Bankruptcy Act, 1890 (53 & 54 Vict. c. 71), s. 10.

SUB-SECT. 6. **Effect of Order generally.**

may be chargeable at the suit of the Crown or of any person for any offence against a statute relating to any branch of the public revenue, or at the suit of the sheriff or other public officer on a bail bond entered into for the appearance of any person prosecuted for any such offence; and he will not be discharged from such excepted debts unless the Treasury certify in writing their consent to his being so discharged (*o*).

Fraud etc.

Nor will an order of discharge release the bankrupt from any debt or liability incurred by means of any fraud or fraudulent breach of trust (*p*) to which he was a party (*q*), or from any debt or liability whereof he had obtained forbearance by any fraud to which he was a party.

Criminal liabilities.

Where the bankrupt has been guilty of a criminal offence he is not exempt from criminal proceedings by reason that he has obtained his discharge (*r*).

Persons liable jointly with bankrupt.

An order of discharge does not release any person who at the date of the receiving order was a partner or co-trustee with the bankrupt, or was jointly bound or had made any joint contract with him, or any person who was surety or in the nature of a surety for him (*s*).

SUB-SECT. 7.—*Effect of English and Foreign Orders of Discharge.*

Effect of English discharges.

450. Not only is a discharge granted by a court of bankruptcy in England a discharge against all the world in the English courts (*t*), but a discharge granted under any imperial statute (*a*) is a discharge against all the world in any British court (*b*).

Effect of discharges by foreign tribunals.

A discharge in bankruptcy granted by a foreign (*c*) tribunal cannot operate in England as a discharge from liability under a contract

(*o*) Bankruptcy Act, 1883 (46 & 47 Vict. c. 52), s. 30 (1).

(*p*) *Ibid.* As to what amounts to fraud, see note (*n*), p. 260, *ante*. It is a fraud for a solicitor to bring an action when he knows he has no authority to do so, and the liability to pay the costs of the defendant is a liability incurred by fraud within the meaning of the section (*Jenkins* v. *Fereday* (1872), L. R. 7 C. P. 358). But the costs of an action for fraudulent breach of trust are not a debt or liability incurred by means of a fraud or fraudulent breach of trust (*Re Green, Napper* v. *Fanshawe* (1895), 2 Mans. 350).

(*q*) The words "fraudulent" and "to which he was a party" were new in the Act of 1883. An order of discharge now releases bankrupts from debts incurred by breaches of trust from which they would not have been released under the earlier Acts, but the present Act does not release bankrupts from debts incurred by their own personal fraud or fraudulent breach of trust.

(*r*) Bankruptcy Act, 1883 (46 & 47 Vict. c. 52), s. 167.

(*s*) *Ibid.*, s. 30 (4); compare *Duncan Fox & Co.* v. *North and South Wales Bank* (1880), 6 App. Cas. 1, *per* Lord BLACKBURN, at p. 19: "Though the indorser of a bill is not exactly a surety for the acceptor, or a co-surety with those who are sureties for the acceptor, yet he stands in a position sufficiently analogous to that of a surety to bring him within the principle of *Dering* v. *Lord Winchelsea*" (1787), 2 Bos. & P. 270. The drawer of a bill is for that purpose in the same position with regard to the acceptor as an indorser.

(*t*) *Armani* v. *Castrique* (1844), 13 M. & W. 443, *per* POLLOCK, C.B., at p. 447.

(*a*) *E.g.*, the English, Scottish, and Irish Bankruptcy Acts (*Callander, Sykes & Co.* v. *Colonial Secretary of Lagos and Davies*, [1891] A. C. 460, at pp. 466, 467).

(*b*) *Gill* v. *Barron* (1868), L. R. 2 P. C. 158, at pp. 175, 176; *Ellis* v. *M'Henry* (1871) L. R. 6 C. P. 228.

(*c*) Including a discharge under an Act of a colonial Legislature (*Bartley* v *Hodges* (1861), 1 B. & S. 375). Compare *Phillips* v. *Allan* (1828), 8 B. & C. 477.

made and to be performed in England, even though the defendant be domiciled in the foreign country (*d*). But where a contract is made or is to be performed in a foreign country, so as to be a contract of that country, and there is a bankruptcy law, or the equivalent of a bankruptcy law, of that country by which, in the circumstances that have occurred, a party to the contract is discharged from liability, he will be discharged from liability in this country (*e*).

SUB-SECT. 7. Effect of English and Foreign Orders.

By parity of reasoning, where an obligation *ex delicto* to pay damages is discharged and avoided by the law of the country where it was made, that is to say, where the liability arose, the accessory right of action is discharged and avoided everywhere (*f*).

But if the foreign law touches only the remedy or procedure for enforcing the obligation, as in the case of an ordinary statute of limitations, such law is no bar to an action in this country. Unless the foreign law extinguishes the right, that is, releases the obligation, it does not amount to a bar in this country (*g*).

SECT. 14.—*Effect of Bankruptcy on Antecedent Transactions.*

SUB-SECT. 1.—*Rights of Creditors under Executions.*

Issue of execution.

451. A creditor who has issued execution against the goods or lands of a debtor, or has attached any debt due to him, is not entitled to retain the benefit of such execution or attachment against the trustee in bankruptcy of the debtor (*h*), unless he has completed the execution (in the case of goods by seizure and sale, in the case of an attachment by receipt of the debt, in the case of land by seizure, or in the case of an equitable interest in land by the appointment of a receiver) before the date of the receiving order (*i*), and before notice of the presentation of a bankruptcy petition by or against the debtor, or of the commission of any available act of bankruptcy by the debtor (*k*).

Estate of deceased insolvent.

The restriction of the rights of creditors under execution or

(*d*) *Gibbs & Sons* v. *Société Industrielle et Commerciale des Métaux* (1890), 25 Q. B. D. 399, approved by the Privy Council in *New Zealand Loan and Mercantile Agency Co.* v. *Morrison*, [1898] A. C. 349. Compare *Smith* v. *Buchanan* (1800), 1 East, 6. The domicile of the defendant is immaterial, and BLACKBURN, J., in *Bartley* v. *Hodges* (1861), 1 B. & S. 375, never meant to lay down that the domicile was material, *Gibbs & Sons* v. *Société Industrielle et Commerciale des Métaux*, *supra*, *per* LINDLEY, L.J., at p. 410.

(*e*) *Gibbs & Sons* v. *Société Industrielle et Commerciale des Métaux*, *supra*, *per* Lord ESHER, M.R., at p. 406.

(*f*) *Phillips* v. *Eyre* (1870), L. R. 6 Q. B. 1, at p. 30. As to conflict of laws generally, see title CONFLICT OF LAWS.

(*g*) *Phillips* v. *Eyre*, *supra*, at p. 29. Compare *Ellis* v. *M'Henry* (1871), L. R. 6 C. P. 228, at p. 234.

(*h*) By the Bankruptcy Act, 1890 (53 & 54 Vict. c. 71), s. 3 (17), the term "trustee in bankruptcy" includes trustee under a composition or scheme if such interpretation is consistent with the terms of the scheme.

(*i*) This does not include an administration order under s. 125 of the Bankruptcy Act, 1883 (46 & 47 Vict. c. 52); see *Hasluck* v. *Clark*, [1899] 1 Q. B. 699.

(*k*) Bankruptcy Act, 1883 (46 & 47 Vict. c. 52), s. 45; Bankruptcy Act, 1890 (53 & 54 Vict. c. 71), s. 11 (1). As to acts of bankruptcy and available acts of bankruptcy, see p. 13, *ante*.

SUB-SECT. 1. Rights of Creditors under Executions.

attachment does not apply to the administration of an insolvent estate under the Judicature Acts or under s. 125 of the Bankruptcy Act, 1883 (*l*).

Winding up of company.

The winding up of a company is also excluded as containing nothing equivalent to "the commission of an available act of bankruptcy," in the case of an individual debtor (*m*).

Benefit of execution.

Apart from express statutory enactment, a judgment creditor who has obtained a writ or process of execution against the judgment debtor under which the sheriff or officer charged with carrying out such writ or process has seized the judgment debtor's goods, acquires by virtue of the seizure a right to the benefit of the execution, and such right would prevail against the title of a bankruptcy trustee in a bankruptcy commencing after the levy of execution (*n*). The effect of the provision of the Bankruptcy Acts above stated is not to make an execution, if levied before the commencement of the bankruptcy, invalid, but in certain specified circumstances to deprive the execution creditor of the benefit of the execution in favour of the general body of creditors (*o*).

Completion of execution.

452. The right or preference which by the levy of execution the individual execution creditor would otherwise secure is lost if the execution has not been completed before the happening of the respective events mentioned above. Accordingly, if, when any of those events happens—*e.g.*, a receiving order is made against the judgment debtor, or he commits an available act of bankruptcy of which the judgment creditor has knowledge—the writ or process of execution has not been carried out to completion, the property seized or taken under the execution and the fruits of it, so far as they have been realised, pass to the trustee in bankruptcy of the judgment debtor for the benefit of the general body of creditors (*p*); and where the execution creditor has received any money or benefit under the incomplete execution, he cannot retain as against the bankruptcy trustee the benefit so received (*q*). The onus of proving that he completed his execution before the date of the receiving order and without notice of an available act of bankruptcy is upon the execution creditor (*r*).

(*l*) Judicature Act, 1875 (38 & 39 Vict. c. 77), s. 10; *Pratt* v. *Inman* (1889), 43 Ch. D. 175; and compare *Re Withernsea Brickworks* (1880), 16 Ch. D. 337; *Mersey Steel and Iron Co.* v. *Naylor, Benzon & Co.* (1884), 9 App. Cas. 434; *Ex parte Official Receiver, Re Gould* (1887), 19 Q. B. D. 92, *per* CAVE, J., at p. 95; *Hasluck* v. *Clarke*, [1899] 1 Q. B. 699. See generally, as to administration of estate of deceased insolvent, pp. 93 *et seq.*, *ante*.

(*m*) *Re National United Investment Corporation*, [1901] 1 Ch. 950; and compare *Re Stanhope Silkstone Collieries Co.* (1879), 11 Ch. D. 160.

(*n*) *Slater* v. *Pinder* (1871), L. R. 6 Exch. 228; *Figg* v. *Moore Brothers*, [1894] 2 Q. B. 690.

(*o*) See, under the Bankruptcy Act, 1869 (32 & 33 Vict. c. 71), *Ex parte Villars, Re Rogers* (1874), 9 Ch. App. 432, 444; *Ex parte Dawes, Re Husband* (1875), L. R. 19 Eq. 438.

(*p*) *Re Dickinson, Ex parte Charrington & Co.* (1888), 22 Q. B. D. 187.

(*q*) *Re Ford, Ex parte Official Receiver*, [1900] 1 Q. B. 264; *Re Pollock and Pendle, Ex parte Wilson and Mathieson, Ltd.* (1902), 87 L. T. 238; *Re Jenkins* (1904), 90 L. T. 65.

(*r*) *Figg* v. *Moore Brothers, supra.*

Payment of judgment debt.

An execution is not completed by the judgment debtor paying the debt to the judgment creditor (*s*), but in a case in which, the sheriff having seized and sold goods in execution and retained the money for the period of fourteen days prescribed by s. 11 of the Bankruptcy Act, 1890 (*t*), the execution debtor and execution creditor met and settled the claim of the execution creditor, who directed the sheriff to withdraw from possession, the execution was held to have been completed so as to prevent the execution creditor from being deprived of the benefit of the execution by reason of a receiving order being made against the judgment debtor after the date of the settlement (*a*).

Completion of execution against land.

453. So in the case of a writ of elegit where the sheriff delivers possession of the debtor's land in execution to the execution creditor, but does not make a return of the writ until after he has had notice of the commission of an act of bankruptcy, the execution is nevertheless complete (*b*). An execution against an equitable interest in land is complete as soon as a receiver has been appointed by the court, notwithstanding that the receiver has not given security and perfected his appointment (*c*).

A writ of elegit does not extend to goods of a debtor, nor can the sheriff proceed under it with regard to goods (*d*), which term includes all chattels personal (*e*). Such a writ, however, still extends to leaseholds (*f*).

Attachment of debt.

454. Where a judgment creditor has obtained a charging order under the Partnership Act, 1890 (*g*), on the judgment debtor's interest in a partnership, and the partners have paid money into court to redeem the judgment debtor's interest and get rid of the charging order, there is not a completed execution (*h*). Also where the form of execution is a writ of sequestration to compel the debtor to pay money into court, and the execution has not been completed by a sale before the receiving order, or if before the receiving order the money received under the sequestration has merely been paid to the sequestrator's account in court, the execution has not been completed, and the execution creditor is not protected (*i*).

(*s*) *Re Pollock & Pendle, Ex parte Wilson & Mathieson, Ltd.* (1902), 87 L. T. 238.

(*t*) See p. 274, *post*.

(*a*) *Re Jenkins* (1904), 90 L. T. 65. But if the sale, for whatever reason, is not a sale under the execution, the execution is not complete, and the title of the trustee is clear (*Heathcote* v. *Livesley* (1887), 19 Q. B. D. 285, *per* WILLS, J., at p. 287). So, too, where an execution creditor caused goods to be seized by the sheriff, who, however, was ordered to withdraw in favour of a receiver, the execution was not completed (*Mackay* v. *Merritt* (1886), 34 W. R. 433).

(*b*) *Re Hobson* (1886), 33 Ch. D. 493.

(*c*) *Ex parte Evans, Re Watkins* (1879), 13 Ch. D. 252

(*d*) Bankruptcy Act, 1883 (46 & 47 Vict. c. 52), s. 146.

(*e*) *Ibid.*, s. 168 (1).

(*f*) *Richardson* v. *Webb* (1884), 1 Morr. 40.

(*g*) 53 & 54 Vict. c. 39, s. 23. See title PARTNERSHIP.

(*h*) *Wild* v. *Southwood*, [1897] 1 Q. B. 317.

(*i*) *Re Pollard, Ex parte Pollard*, [1903] 2 K. B. 41; *Re Hastings, Ex parte Brown* (1892), 61 L. J. (Q. B.) 654, *per* WILLIAMS, J., at p. 659; and compare *Ex parte Nelson, Re Hoare* (1880), 14 Ch. D. 41.

SUB-SECT. 1. Rights of Creditors under Executions.

Neither an order *nisi* charging stocks and shares under the Judgments Act, 1838 (*k*), nor a charging order upon a fund in court (*l*), nor an order obtained *ex parte* appointing a receiver of a debtor's interest in a residuary estate (*m*), are completed executions protected under the provisions of the Bankruptcy Acts.

Charging orders.

Completion of attachment of debt.

As in the case of an execution, an attachment, to be protected, must be completed and not merely partly carried out. Where, therefore, a judgment creditor attaches a debt, but agrees not to enforce the attachment against the garnishee before a certain date, and before this date a receiving order is made against the judgment debtor on which he is afterwards adjudicated bankrupt, the creditor cannot maintain his claim to the debt which has been attached, and the garnishee must pay it to the trustee in bankruptcy (*n*). An actual receipt by the judgment creditor is necessary to complete an attachment (*o*).

SUB-SECT. 2.—*Duties of Sheriff under Executions.*

Retention of proceeds after sale etc.

455. Where under an execution in respect of a judgment for a sum exceeding £20 the goods of a debtor are sold, or money is paid by or on behalf of the debtor or out of his estate in order to avoid a sale (*p*), the sheriff, after deducting his costs of execution from the proceeds of sale or money paid, is required to retain the balance for a period of fourteen days from the date of the sale, if any (*q*), or from the date when the money is paid; and if within that time he is served with notice of the presentation of a bankruptcy petition by or against the debtor whose goods have been sold (*r*), and a receiving order is made thereon or on any other petition of which the sheriff has notice within the same period (*s*), it is his duty to pay such balance to the official receiver or trustee, who is entitled to retain it as against the execution creditor (*t*).

When creditor deprived of benefit of execution.

456. The execution is not rendered void by the notice, but if it be for a sum over £20 the creditor is deprived of the benefit of it in favour of the trustee (*u*). A creditor for more than £20 may avoid this peril by entering judgment for less than that amount (*v*) or by issuing execution for less (*w*), or, finally, if execution be

(*k*) 1 & 2 Vict. c. 110, s. 14; *Re Hutchinson, Ex parte Hutchinson* (1885), 16 Q. B. D. 515.

(*l*) *Re O'Shea*, [1895] 1 Ch. 325.

(*m*) *Re Potts, Ex parte Taylor*, [1893] 1 Q. B. 648.

(*n*) *Re Trehearne* (1890), 60 L. J. (Q. B.) 50.

(*o*) *Butler* v. *Wearing* (1885), 17 Q. B. D. 182; and compare *Re O'Shea, supra.*

(*p*) Money paid by the debtor's father to prevent seizure, not being the debtor's money, is not money to which this provision applies, and need not be retained by the sheriff (*Bower* v. *Hett*, [1895] 2 Q. B. 337).

(*q*) *Re Cripps, Ross & Co., Ex parte Ross* (1888), 21 Q. B. D. 472. The period is not curtailed by the limitation of the hours of service on Saturday imposed by Bankruptcy Rules, r. 90 (*Lole* v. *Betteridge* (1897), 5 Mans. 1).

(*r*) *Dibb* v. *Brooke & Sons*, [1894] 2 Q. B. 338.

(*s*) *Watkins* v. *Barnard*, [1897] 2 Q. B. 521.

(*t*) Bankruptcy Act, 1890 (53 & 54 Vict. c. 71), s. 11 (2).

(*u*) *Re Pearce, Ex parte Crossthwaite* (1885), 14 Q. B. D. 966.

(*v*) *Ex parte Reya, Re Salinger* (1877), 6 Ch. D. 332.

(*w*) *Re Hinks, Ex parte Berthier* (1878), 7 Ch. D. 882.

levied for a larger amount, by directing a sale for £20 only (*x*). Inasmuch, however, as an execution is not protected if the total amount levied under it in respect of a judgment exceeds £20 (*y*), it follows that although the judgment be for less than £20, yet if by the addition of poundage, or officer's fee (*a*), or possession money (*b*), the limit is exceeded, the execution creditor is not entitled to the benefit of the levy.

SUB-SECT. 2. Duties of Sheriff under Executions.

Interpleader proceedings.

457. The operation of the enactment is not suspended by interpleader proceedings commenced by the sheriff by reason of a claim by a third party to the goods seized ; and consequently if under an order of court the goods are sold and the proceeds paid into court, and the claim is disallowed, then, provided that the required notice has been given within fourteen days of the sale, the trustee is entitled to the money as against the execution creditor (*c*).

If, however, under the order the claimant pays or deposits the value of the goods, and the sheriff withdraws from possession, the trustee cannot attach the money, as it is not, and never was, the property of the debtor (*d*), but in that case, if the claim fail, the property in the goods remains in the debtor, and they may be seized under another judgment (*e*) or by the trustee.

SUB-SECT. 3.—*Avoidance of Fraudulent and Voluntary Settlements.*

When voluntary settlement avoided.

458. Any settlement of property not being a settlement made before and in consideration of marriage or made in favour of a purchaser or incumbrancer in good faith and for valuable consideration, or a settlement made on or for the wife or children of the settlor of property which has accrued to him after marriage in right of his wife, is void against the trustee (1) if the settlor become bankrupt within two years after the date of the settlement, or (2) if the settlor become bankrupt within ten years from that date unless the parties claiming under it can show that at such date the settlor was able to pay all his debts without the aid of the property settled, and that the interest of the settlor in such property passed to the trustee of the settlement upon the execution thereof (*f*).

Property must be under settlor's control.

This provision only applies to property belonging to the settlor and under his control at the time of the settlement (*g*). Damages awarded in a divorce action and paid into court and settled under the direction of the court cannot be regarded as the husband's property (*h*).

(*x*) *Turner* v. *Bridgett* (1881), 8 Q. B. D. 392.
(*y*) *Ex parte Liverpool Loan Co., Re Bullen* (1872), 7 Ch. App. 732.
(*a*) *Howes* v. *Young, Howes* v. *Stone* (1876), 1 Ex. D. 146.
(*b*) *Ex parte Sims, Re Grubb* (1877), 5 Ch. D. 375 ; *Ex parte Lithgow, Re Fenton* (1878), 10 Ch. D. 169; but see *Ex parte Ind, Coope & Co., Re Bullen* (1881), 44 L. T. 587, where there were special circumstances.
(*c*) *Heathcote* v. *Livesley* (1887), 19 Q. B. D. 285.
(*d*) *Shuckburgh* v. *Duthoit, Pike, Claimant* (1892), 8 T. L. R. 710.
(*e*) *Haddow* v. *Morton*, [1894] 1 Q. B. 95 and, on appeal, 565. Compare *Kotchie* v. *Golden Sovereigns, Ltd.*, [1898] 2 Q. B. 164.
(*f*) Bankruptcy Act, 1883 (46 & 47 Vict. c. 52), s. 47. See also title FRAUDULENT AND VOLUNTARY CONVEYANCES.
(*g*) *Re Ashby, Ex parte Wreford*, [1892] 1 Q. B. 872.
(*h*) *Re Stephenson, Ex parte Brown*, [1897] 1 Q. B 638.

SUB-SECT. 3. Avoidance of Settlements.

Definition of settlement.

459. The term "settlement," although it includes any conveyance or transfer of property (*i*), implies an intention that the property shall be retained or preserved for the benefit of the donee in such a form that it can be traced (*j*). The term is not applicable to a gift which is intended to be expended at once, and not retained by the donee, such as a gift of money to a son to enable him to start in business (*k*) or the surrender of debentures and release of a claim against a company to enable a son to buy the company's business; but a gift of money to a son to pay for shares in a ship on which the son was to receive the dividends (*l*), a gift of diamonds by a bankrupt to his wife (*m*), and a present of jewellery, furniture, and money to buy furniture made by a bankrupt to a lady with whom he was intimate (*n*) have all been treated as settlements.

The voluntary payment by the bankrupt of premiums on policies included in a settlement more than ten years old cannot be regarded as a settlement so as to entitle the trustee in bankruptcy to any part of the policy moneys or even to a return of the premiums paid within the ten years (*o*), but there may be circumstances in which a policy taken out within the ten years would fall within the provision (*p*).

Solvency of settlor.

460. In inquiring into the settlor's ability to pay all his debts at the date of the settlement without resorting to the settled property, it is necessary to take into account all his liabilities, whether present or contingent, and place a reasonable estimate upon them. Thus a mortgage debt may be disregarded if the equity of redemption only is settled (*q*), but in a case where upon the settlement of property subject to a mortgage the settlor covenants to pay off the mortgage debt and interest, the result may be to leave him with insufficient property to discharge all his liabilities, although it would have been otherwise had he settled the equity of redemption only (*r*).

Effect of contingent liabilities.

In considering the question of a settlor's solvency a contingent liability under a guarantee may have to be taken into account (*s*), and also a contingent debt such as a covenant by a husband to pay a sum of money to his wife if she survives him (*t*). Damages awarded against the settlor for misrepresentations made before the settlement must be included among the settlor's liabilities although the action in which they were awarded was not commenced until after the execution of the settlement (*u*). On the other hand, a speculative claim against the settlor for damages in an action for breach of promise of marriage just started need not be taken into

(*i*) Bankruptcy Act, 1883 (46 & 47 Vict. c. 52), s. 47 (3).
(*j*) *Re Plummer*, [1900] 2 Q. B. 790.
(*k*) *Re Player, Ex parte Harvey* (No. 2) (1885), 15 Q. B. D. 682.
(*l*) *Ibid.* (No. 1) (1885), 2 Morr. 261.
(*m*) *Re Vansittart, Ex parte Brown*, [1893] 1 Q. B. 181.
(*n*) *Re Tankard, Ex parte Official Receiver*, [1899] 2 Q. B. 57.
(*o*) *Re Harrison & Ingram, Ex parte Whinney*, [1900] 2 Q. B. 710.
(*p*) *Ibid., per* Lord ALVERSTONE, M.R., at p. 718.
(*q*) *Jenkyns* v. *Vaughan* (1855), 3 Drew. 419.
(*r*) *Ex parte Huxtable, Re Conibeer* (1876), 2 Ch. D. 54.
(*s*) *Re Ridler* (1882), 22 Ch. D. 74, *per* Lord SELBORNE, L.C., at p. 80.
(*t*) *Rider* v. *Kidder* (1805), 10 Ves. 360, upon the statute 13 Eliz. c. 5.
(*u*) *Crossley* v. *Elworthy* (1871), L. R. 12 Eq. 158.

account where there is evidence that the settlor had not the claim in mind at the time when he made the settlement (*w*). Where the settlor is a member of a firm, the liabilities of the firm must be taken into account in estimating his solvency (*a*).

Settlor's assets.

With regard to the settlor's assets, the test under the Bankruptcy Act, 1883, is whether they are available for creditors at the date of the settlement (*b*). The plant used in a business (*a*) or the value of implements of trade or goodwill should not be taken into account, or at any rate should be taken only at their value at a forced sale (*c*). A settlor, if he is a man in business, must be able to pay his debts in the manner in which he proposes to pay them, namely, by continuing his business (*d*).

A debt due to the settlor from a person for whom he is guarantor cannot be reckoned as part of his assets except possibly where the prospect of his being called upon to pay the amount of the guarantee is so remote that it would not enter into anyone's calculations (*e*); but the value of any interest reserved to the settlor by the settlement must be taken into account in estimating his solvency (*f*).

Interest passing to trustee of settlement.

461. The condition that the interest of the settlor in the settled property shall pass to the trustee of the settlement upon its execution does not apply to any interest given to or retained by the settlor under the settlement, but is intended to prevent a settlement *in futuro*, a covenant, for instance, to settle specific property which the trustee of the settlement could have enforced against the trustee in bankruptcy in the case of the settlor's bankruptcy (*g*). If a settlement contains a power of revocation enabling the settlor to deal with the settled property, it would probably be held that the property did not pass to the trustee for the purpose of upholding the validity of the settlement on the settlor becoming bankrupt (*h*).

Settlement in consideration of marriage.

462. A settlement made before and in consideration of marriage is protected, but where there is evidence of an intent in the minds of both parties to the marriage to defeat and delay creditors and to make the celebration of marriage part of a scheme to protect property against the rights of creditors, the settlement will be void (*i*); but it will be otherwise if the wife be innocent of the fraud (*k*).

(*w*) *Ex parte Mercer, Re Wise* (1886), 17 Q. B. D. 290.
(*a*) *Denison* v. *Tattersall* (1868), 18 L. T. 303.
(*b*) *Ex parte Russell, Re Butterworth* (1882), 19 Ch. D. 588; *Freeman* v. *Pope* (1870), 5 Ch. App. 538.
(*c*) *Ex parte Russell, Re Butterworth, supra.*
(*d*) *Ibid., per* LINDLEY, L.J., at p. 601.
(*e*) *Re Ridler* (1882), 22 Ch. D. 74, *per* Lord SELBORNE, L.C., at pp. 79, 80.
(*f*) *Re Lowndes, Ex parte Trustee* (1887), 18 Q. B. D. 677.
(*g*) *Ibid.*
(*h*) See, under the statute 13 Eliz. c. 5, *Holcraft's Case* (1629), Dyer, 203 a; *Jenkyns* v. *Vaughan* (1855), 3 Drew. 419, 427.
(*i*) *Colombine* v. *Penhall* (1853), 1 Sm. & G. 228; *Bulmer* v. *Hunter* (1869), L. R. 8 Eq. 46, 49; *Re Pennington, Ex parte Pennington* (1888), 5 Morr. 268.
(*k*) *Kevan* v. *Crawford* (1877), 6 Ch. D. 29; *Campion* v. *Cotton* (1810), 17 Ves. 263; *Parnell* v. *Stedman* (1883), 1 Cab. & El. 153. See also *Re Reis, Ex parte Clough*, [1904] 2 K. B. 769.

SUB-SECT. 3. Avoidance of Settlements.

Who are purchasers for value.

463. The word "purchaser" is not used in a strictly legal sense; it means any person who has given valuable consideration although not a beneficiary under the settlement. Thus a deed by which a bankrupt settles his property and the bankrupt's father settles other property upon trust for the bankrupt's wife and children (*l*), or a settlement by the bankrupt of his property upon similar trusts in consideration of an annuity provided by the bankrupt's mother (*m*), is a settlement in favour of a purchaser for value, and is valid if made in good faith on the part of the purchaser, whatever may be the intention of the other parties to the transaction (*n*).

A purchase for value not made in good faith, that is, where the purchaser is privy to the intention to defeat creditors, is void under the Bankruptcy Acts (*o*).

The trustees of a settlement of leasehold property do not, merely by undertaking the obligations of the lessee, become purchasers so as to prevent the settlement, if otherwise without valuable consideration, from being voluntary (*p*); and the trustees of a settlement under which the bankrupt has a life interest, who agree to make him an advance on condition that he settles his life interest and other property, are not purchasers for value so as to make the second settlement valid as against the settlor's creditors (*q*).

Settlement partly void.

464. A settlement may be partly void and partly valid, *e.g.*, if the donee under it joins the settlor in obtaining an advance upon the property, the settlement is valid to the extent of the advance (*r*).

Contract for future settlement.

465. Any contract or covenant made in consideration of marriage for the future settlement on the settlor's wife or children of any money or property wherein he had not, at the time of his marriage, any estate or interest vested or contingent, and not being money or property of or in right of his wife, is void as against the trustee in the settlor's bankruptcy if the settlor has committed an available act of bankruptcy before the money or property was actually transferred or paid pursuant to the contract or covenant (*a*).

A covenant to pay a sum of money without indicating the source from which it will be derived is not within this rule (*b*).

(*l*) *Hance* v. *Harding* (1888), 20 Q. B. D. 732.
(*m*) *Re Tetley, Ex parte Jeffrey* (1896), 3 Mans. 226, on appeal 321.
(*n*) *Ibid.*; *Mackintosh* v. *Pogose*, [1895] 1 Ch. 505.
(*o*) *Re Maddever* (1884), 27 Ch. D. 523.
(*p*) *Ex parte Hillman, Re Pomfrey* (1879), 10 Ch. D. 622; *Re Ridler* (1882), 22 Ch. D. 74.
(*q*) *Re Parry, Ex parte Salaman*, [1904] 1 K. B. 129.
(*r*) *Re Naylor, Ex parte Stephenson* (1893), 10 Morr. 173.
(*a*) Bankruptcy Act, 1883 (46 & 47 Vict. c. 52), s. 47 (2); *Re Reis, Ex parte Clough*, [1904] 1 K. B. 451, reversed on appeal on the ground that as a fact an act of bankruptcy had not been committed and on other grounds, [1904] 2 K. B. 769.
(*b*) *Ex parte Bishop, Re Tönnies* (1873), 8 Ch. App. 718; *Re Knight, Ex parte Cooper* (1885), 2 Morr. 223.

SUB-SECT. 3. Avoidance of Settlements.

466. A settlement which is void under the Bankruptcy Act is avoided only to the extent necessary to pay the unsecured creditors (*c*), but the effect of the avoidance is not to put the trustee in the position of the beneficiaries under the settlement, and any charges on the property created by the settlor between the execution of the settlement and the bankruptcy have priority over the trustee's claim (*d*). In like manner, in a case where the bankrupt is found lunatic between the date of the gift (settlement) and the bankruptcy, and the gift is admitted to be void, the court, by virtue of its jurisdiction in lunacy, can intercept the property for the benefit of the lunatic (*e*).

Extent of avoidance.

Subject, however, to any intervening rights and the claim of the trustee in bankruptcy, the surplus of the property, if any, remains bound by the trusts of the settlement (*f*).

The settlement is void, *i.e.*, voidable (*g*), only from the date when the trustee's title accrues, that is to say, the commencement of the bankruptcy. A purchaser for value from a beneficiary under the settlement before that date has a good title against the trustee (*h*). In the same way the trustees of the settlement are entitled to a lien on the trust property for costs, charges, and expenses incurred by them before that date (*i*). They would also be entitled to retain out of the trust estate their costs of resisting the claim of the trustee in bankruptcy to set aside the deed (*k*), but not the costs of an appeal by them against an order setting aside the settlement (*l*).

Date of avoidance.

The circumstances attending the execution of a voluntary settlement generally demand a searching investigation, and a trustee in bankruptcy who fails in an attempt to set aside a settlement will not, as a rule, be required personally to pay costs if unsuccessful (*m*), unless he raises contentions that the evidence does not support (*n*).

Trustee's costs of attempt to set aside settlement

SUB-SECT. 4.—*Avoidance of Fraudulent Preference.*

467. The object of the bankruptcy law being the equal division of the bankrupt's property amongst his creditors, with a view of securing that equality the bankruptcy law contains an

Object of avoidance.

(*c*) *Ex parte Bell, Re Webb* (1822), 1 Gl. & J. 282; *Curtis* v. *Price* (1806), 12 Ves. 89, at p. 103; *French* v. *French* (1855), 6 De G. M. & G. 95; *Re Sims, Ex parte Sheffield* (1896), 3 Mans. 340.

(*d*) *Sanguinetti* v. *Stuckey's Banking Co.*, [1895] 1 Ch. 176.

(*e*) *Re Farnham*, [1895] 2 Ch. 799.

(*f*) *Re Sims, Ex parte Sheffield* (1896), 3 Mans. 340; *Re Parry, Ex parte Salaman*, [1904] 1 K. B. 129; *French* v. *French, supra.*

(*g*) *Re Brall, Ex parte Norton*, [1893] 2 Q. B. 381.

(*h*) *Re Carter and Kenderdine*, [1897] 1 Ch. 776.

(*i*) *Re Holden, Ex parte Official Receiver* (1887), 20 Q. B. D. 43 (*e.g.*, in defending the settlement against the settlor).

(*k*) *Ibid.*; *Merry* v. *Pownall*, [1898] 1 Ch. 306; *Ideal Bedding Co.* v. *Holland*, [1907] 2 Ch. 157.

(*l*) *Ex parte Russell, Re Butterworth* (1882), 19 Ch. D. 588.

(*m*) *Re Tetley, Ex parte Jeffrey* (1896), 3 Mans. 226, 237, following *Thompson* v. *Webster* (1859), 4 De G. & J. 607.

(*n*) *Re Lane-Fox, Ex parte Gimblett*, [1900] 2 Q. B. 508, 514.

SUB-SECT. 4. Avoidance of Fraudulent Preference.

enactment by which payments or transfers of property made by the bankrupt with the view of giving a preference to one particular creditor over the general body will in certain circumstances be set aside, and the money or property will be brought into the bankrupt's estate (*o*).

Meaning of fraudulent preference.

468. The law provides that every conveyance or transfer by a debtor of his property (*p*), every charge made by him thereon, every payment made by him, every obligation incurred by him, and every judicial proceeding affecting his property (*q*) taken or suffered by him is fraudulent and void against his trustee in bankruptcy, provided four conditions be fulfilled. These conditions are—(1) the debtor must at the date of the transaction be unable to pay from his own money his debts as they fall due; (2) the transaction must be in favour of a creditor, or of some person in trust for a creditor; (3) the debtor must have acted with the view (*r*) of giving such creditor a preference over his other creditors; (4) the debtor must be adjudged bankrupt on a bankruptcy petition presented within three months after the date of the transaction sought to be impeached (*s*).

The first and fourth of these conditions have an important connection with one another; their combined effect is to render it unnecessary to inquire whether the debtor acted in contemplation of bankruptcy (*a*); this question is now irrelevant, at any rate

(*o*) Although the law of fraudulent preference is now regulated by statute —the Bankruptcy Act, 1883 (46 & 47 Vict. c. 52), s. 48—it arose rather by the contrivance of courts of law than on the language of the Bankruptcy Acts (*Cook* v. *Rogers* (1831), 7 Bing. 438). The older statutes relating to bankruptcy contained no provisions invalidating payments made prior to the act of bankruptcy (*Bills* v. *Smith* (1865), 34 L. J. (Q. B.) 68; *Crosby* v. *Crouch* (1809), 11 East, 256). Considerable discussion has arisen on the question whether the principles governing the application of the doctrine of fraudulent preference which had been elaborated by the courts have been altered by reason of their being defined by statute law, the Bankruptcy Act, 1869 (32 & 33 Vict. c. 71), s. 92, being repealed by, but on this point substantially re-enacted in, the Bankruptcy Act, 1883 (46 & 47 Vict. c. 52), s. 48 (1). The better opinion is that, save on one point (as to which see note (*a*), *infra*, and note (*d*), p. 286, *post*), the principles have not substantially been altered (see *Ex parte Tempest, Re Craven & Marshall* (1870), 6 Ch. App. 70, 75; *Ex parte Blackburn, Re Cheesebrough* (1871), L. R. 12 Eq. 358; *Ex parte Topham, Re Walker* (1873), 8 Ch. App. 614; *Tomkins* v. *Saffery* (1877), 3 App. Cas. 213, 235; *Sharp* v. *Jackson*, [1899] A. C. 419, 427; *Ex parte Hill, Re Bird* (1883), 23 Ch. D. 695, *per* BOWEN, L.J., at p. 704); and that, while it is the duty of the courts to have regard to and to construe the language of the Act, it is still necessary to look to the old decisions as guides (*Ex parte Griffith, Re Wilcoxon* (1883), 23 Ch. D. 69).

(*p*) As to the meaning of "property," see the Bankruptcy Act, 1883 (46 & 47 Vict. c. 52), s. 168 (1), and p. 14, *ante*.

(*q*) *Ex parte Lancaster, Re Marsden* (1883), 25 Ch. D. 311; *Butcher* v. *Stead* (1875), L. R. 7 H. L. 839, *per* Lord HATHERLEY, at p. 848.

(*r*) *Ex parte Hill, Re Bird* (1883), 23 Ch. D. 695, *per* BOWEN, L.J., at p. 704. The Act says "*a* view."

(*s*) Bankruptcy Act, 1883 (46 & 47 Vict. c. 52), s. 48 (1); *Sharp* v. *Jackson*, [1899] A. C. 419.

(*a*) Until the passing of the Bankruptcy Act, 1869 (32 & 33 Vict. c. 71), it was held that before a transaction could be set aside as a fraudulent preference it was necessary to prove that the act was voluntary, and that it had been done in contemplation of bankruptcy; and the state of the debtor's mind had to be

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so far as its determination in the affirmative would be a condition precedent to the avoidance of a transaction as a fraudulent preference (*b*); the test which these two conditions create is necessary and sufficient.

Relation of debtor and creditor essential.

469. In order to avoid a transaction as a fraudulent preference it is essential that the relation of debtor and creditor should exist between the parties to the transaction (*c*). The person for whose benefit the act, whether conveyance of property, payment, or whatever it may be, is done must be a creditor of the person doing the act; that is, he must be one who at the date of the transaction, had bankruptcy supervened, would have had a right to prove and to share in the distribution of the bankrupt's estate (*d*). If, then, the person whom the debtor intends to benefit is a surety for him, the payment by the debtor of the guaranteed debt will not be a fraudulent preference if the payment be made to the creditor (*e*), though it may be so if the payment is made directly or substantially to the surety (*f*). In like manner, where an insolvent defaulting trustee replaces money or property forming part of the trust estates which he has abstracted or taken, this does not amount to a payment or transfer to a creditor within this provision of the bankruptcy law (*g*).

explored in two directions (*Hartshorn* v. *Slodden* (1801), 2 Bos. & P. 582; *Crosby* v *Crouch* (1809), 11 East, 256; *Hunt* v. *Mortimer* (1829), 10 B. & C. 44; *Morgan* v. *Brundrett* (1833), 5 B. & Ad. 289; *Atkinson* v. *Brindall* (1835), 2 Scott, 369; *Gibson* v. *Boutts* (1836), 3 Scott, 229; *Marshall* v. *Lamb* (1843), 5 Q. B. 115; *Van Casteel* v. *Booker* (1848), 2 Exch. 691; *Brown* v. *Kempton* (1850), 19 L. J. (C. P.) 169; *Nunes* v. *Carter* (1866), L. R. 1 P. C. 342). The Bankruptcy Act, 1883 (46 & 47 Vict. c. 52), s. 48 (1), herein re-enacting the provisions of the Bankruptcy Act, 1869 (32 & 33 Vict. c. 71), s. 92, substitutes the facts that the debtor was unable to pay out of his own money his debts as they fall due and that the act was committed within three months of a bankruptcy petition for the inquiry whether the act was done in contemplation of bankruptcy. It is in this respect that existing legislation has modified the old law (*Butcher* v. *Stead* (1875), L. R. 7 H. L. 839).

(*b*) *Ex parte Blackburn, Re Cheesebrough* (1871), L. R. 12 Eq. 358; *Butcher* v. *Stead, supra.*

(*c*) Bankruptcy Act, 1883 (46 & 47 Vict. c. 52), s. 48 (1); *Ex parte Kelly & Co., Re Smith, Fleming & Co.* (1879), 11 Ch. D. 306; *Ex parte Stubbins, Re Wilkinson* (1881), 17 Ch. D. 58; *Re Bear, Ex parte Official Receiver* (1886), 3 Morr. 129.

(*d*) *Ex parte Read, Re Paine*, [1897] 1 Q. B. 122, followed in *Re Blackpool Motor Car Co., Ltd.*, [1901] 1 Ch. 77.

(*e*) *Re Mills, Ex parte Official Receiver* (1888), 5 Morr. 55; *Re Warren, Ex parte the Trustee*, [1900] 2 Q. B. 138.

(*f*) *Ex parte Read, Re Paine, supra; Re Blackpool Motor Car Co., Ltd., supra.* It must, however, be observed that *Re Mills, supra*, was a decision of the Court of Appeal, and that in that case Lord ESHER, M.R., described the surety as "someone who is not a creditor."

(*g*) *Sharp* v. *Jackson*, [1899] A. C. 419; *Ex parte Ball, Re Hutchinson* (1887), 35 W. R. 264. Both a co-trustee and a *cestui que trust* can prove in the bankruptcy of a defaulting trustee (*Re Sheppard* (1887), 19 Q. B. D. 84). On the question of the circumstances in which a trust estate or a co-trustee is a creditor within the Bankruptcy Acts of a defaulting trustee, in the case of *Ex parte Blane, Re Hallett & Co.*, [1894] 2 Q. B. 237, Lord DAVEY, L.J., considered that where the solvent trustee or the trust estate could not follow the abstracted money into the defaulter's hands, there could be a proof against his estate. See also *Re Blackpool Motor Car Co., Ltd., supra;* and *Ex parte Dyer, Re Lake*, [1901] 1 K. B. 710.

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Act must be done in favour of creditor.

470. Again, in order that a transaction may be a fraudulent preference, not only must the person who derives the advantage from the transaction be a creditor, but the act must have been done in his favour, and not in favour of anyone else. Where, therefore, although the creditor be in fact preferred in the sense of obtaining a benefit not shared by the debtor's other creditors, yet the act was done by the debtor with a view of benefiting himself, and not the creditor (*h*), then, even if all the other elements of fraudulent preference be present, the transaction cannot, on the ground that the creditor derives an advantage, be set aside (*i*).

Transaction must be with creditor intended to be preferred.

Further, while the person must be a creditor, and the act must be done in his favour, the payment, or other disposal of property, must be made to the creditor intended to be preferred (*k*), even in those cases in which a surety is held to be a creditor (*l*).

Payments and other dispositions of property made to anyone in trust for a creditor are in the same position as if they were made to the creditor himself (*m*).

View of preferring creditor.

471. In order that a transaction may be set aside as a fraudulent preference, it is necessary to prove that it was carried out with the (*n*) substantial or dominant (*o*) view of giving the creditor a preference over the other creditors. This need not be the primary result aimed at; it is sufficient that it should be the object aimed at in bringing about the primary result (*p*). If the transaction can properly be referred to some other motive than that of giving the creditor paid a preference over the other creditors, the payment is not fraudulent and void (*q*), for it is from the intention on the part of the debtor to act in fraud of the law, that is, to prevent the distribution of the bankrupt's property rateably among all his creditors, that the invalidity of the transaction arises (*r*).

Test to be applied.

In ascertaining whether the giving of a preference, that is, putting

(*h*) Such as making a payment in the hope, however desperate, that if he were able to keep himself alive commercially something might turn up in his favour: *Tomkins* v. *Saffery* (1877), 3 App. Cas. 213, 235; and see *Sharp* v. *Jackson*, [1899] A. C. 419, *per* Lord SHAND, at p. 427.

(*i*) *Tompkins* v. *Saffery*, *supra*.

(*k*) *Abbott* v. *Pomfret* (1835), 1 Scott, 470; *Re Mills*, *Ex parte Official Receiver* (1888), 5 Morr. 55; *Re Warren*, *Ex parte the Trustee*, [1900] 2 Q. B. 138. See note (*d*), p. 286, *post*.

(*l*) See note (*f*), p. 281, *ante*.

(*m*) Bankruptcy Act, 1883 (46 & 47 Vict. c. 52), s. 48 (1).

(*n*) The Act says "with *a* view," but in *Ex parte Hill*, *Re Bird* (1883), 23 Ch. D. 695, BOWEN, L.J., at p. 704, said that those words were equivalent to "with *the* view."

(*o*) *Ex parte Griffith*, *Re Wilcoxon* (1883), 23 Ch. D. 69; *Ex parte Hill*, *supra*. These decisions, both of which were given in the Court of Appeal, have been followed on more than one occasion (*e.g.*, *Re Wilkinson*, *Ex parte Official Receiver* (1884), 1 Morr. 65; *Re Bell*, *Ex parte Official Receiver* (1892), 10 Morr. 15; *Re Clay*, *Ex parte the Trustee* (1895), 3 Mans. 31).

(*p*) *New*, *Prance*, *and Garrard's Trustee* v. *Hunting*, [1897] 1 Q. B. 607, 617.

(*q*) *Ex parte Blackburn*, *Re Cheesebrough* (1871), L. R. 12 Eq. 358.

(*r*) *Bills* v. *Smith* (1865), 34 L. J. (Q. B.) 68.

the creditor in a better position relatively to the other creditors than that in which he would be placed by the bankruptcy law (*a*), was the dominant view in the debtor's mind, the proper test to be applied is, Was the act done voluntarily (*b*)?—a question the solution of which depends primarily on the inquiry, From which party did the proposition originate? A voluntary disposition is an act moving from the debtor (*c*); a voluntary payment is a payment simply by the act and will of the party making it; if there is anything to interfere with or control this will, then it is not a voluntary payment (*d*). The question always is, Did the thing move from the debtor or from the creditor? (*e*) If it moves entirely from the debtor in the sense that it was his spontaneous act (*f*), uninfluenced by any circumstances which tend to rebut the presumption that the bankrupt made a distinction among his creditors (*g*), then the transaction will be held to be a fraudulent preference (*b*). On the other hand, if the proposal for the payment or disposition of the property comes entirely from the creditor and is not collusive, the transaction will stand (*h*).

Transaction under pressure.

That the transaction was not the spontaneous act of the debtor can best be established by proving that it was the result of pressure (*i*) brought to bear on the debtor either by a creditor in the ordinary sense or by a surety (*k*). The pressure must be real (*l*); the debtor must have been under some genuine apprehension (*m*); it must have been operative on his mind, and the dominant influence (*n*) affecting it; the transaction must have

(*a*) *Bourne* v. *Graham* (1856), 2 Jur. (N. S.) 1225.

(*b*) *Thompson* v. *Freeman* (1786), 1 Term Rep. 155; *Hartshorn* v. *Slodden* (1801), 2 Bos. & P. 582; *Crosby* v. *Crouch* (1809), 11 East, 256; *Hunt* v. *Mortimer* (1829), 10 B. & C. 44; *Brown* v. *Kempton* (1850), 19 L. J. (C. P.) 169; *Bourne* v. *Graham*, *supra*; *Butcher* v. *Stead* (1875), L. R. 7 H. L. 839; *Re Fletcher*, *Ex parte Suffolk* (1891), 9 Morr. 8; *Re Eaton & Co.*, *Ex parte Viney*, [1897] 2 Q. B. 16; *Re Vautin*, *Ex parte Saffery*, [1900] 2 Q. B. 325.

(*c*) *Read* v. *Ayton* (1817), Holt (N. P.), 503.

(*d*) *Strachan* v. *Barton* (1856), 11 Exch. 647, *per* ALDERSON, B., at p. 650.

(*e*) *Ex parte De Tastet*, *Re Latham* (1831), Mont. 153. See also *Crosby* v. *Crouch* (1809), 11 East, 256; *Van Casteel* v. *Booker* (1848), 2 Exch. 691; *Brown* v. *Kempton* (1850), 19 L. J. (C. P.) 169; *Strachan* v. *Barton*, *supra*.

(*f*) *Ex parte Tempest*, *Re Craven & Marshall* (1870), 6 Ch. App. 70.

(*g*) *Bills* v. *Smith* (1865), 34 L. J. (Q. B.) 68.

(*h*) *Crosby* v. *Crouch*, *supra*; and see *Re Hall* (1882), 19 Ch. D. 580, as to the creditor's demand being honest and real.

(*i*) *Thompson* v. *Freeman*, *supra*; *Hartshorn* v. *Slodden*, *supra*; *Brown* v. *Kempton*, *supra*; *Ex parte Topham*, *Re Walker* (1873), 8 Ch. App. 614; *Tomkins* v. *Saffery* (1877), 3 App. Cas. 213; *Butcher* v. *Stead* (1875), L. R. 7 H. L. 839; *Sharp* v. *Jackson*, [1899] A. C. 419. The word "preference" implies an act of free-will, and therefore there can be no preference where the act is the result of pressure (*Butcher* v. *Stead*, *supra*; *Sharp* v. *Jackson*, *supra*).

(*k*) *Van Casteel* v. *Booker* (1848), 2 Exch. 691; *Edwards* v. *Glyn* (1859), 28 L. J. (Q. B.) 350, 360.

(*l*) *Graham* v. *Candy* (1862), 3 F. & F. 206; *Ex parte Wheatley*, *Re Grimes* (1881), 45 L. T. 80; *Ex parte Hall*, *Re Cooper* (1882), 19 Ch. D. 580.

(*m*) *Re Boyd*, *Ex parte Boyd* (1889), 6 Morr. 209.

(*n*) *Re Bell*, *Ex parte Official Receiver* (1892), 10 Morr. 15.

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been entered into by reason of it (*o*); and it must not have been fraudulent (*p*).

Threat of proceedings.

The pressure need not be a threat of legal proceedings (*q*); there need not even be an immediate power of taking such proceedings (*r*); but where proceedings have been threatened, or where the debtor believes, even erroneously, that proceedings are about to be taken (*s*), the case in favour of the validity of the transaction is all the stronger.

Desire to prefer and concurrent pressure.

If such pressure be proved to exist, it is of no importance that there was also present to the debtor's mind a desire to prefer (*t*). On the other hand, it appears that, notwithstanding that the payment might never have been made but for the importunity, yet it is a fraudulent preference if it be also a fact that the payment never would have been made but for the desire to prefer (*a*).

Other circumstances negativing fraudulent intention.

But though pressure by the creditor, if real and operative, is conclusive in favour of the validity of the transaction, still it is not necessary to prove pressure if there are other circumstances which suffice to repel the presumption of fraudulent intention, and to show that the act complained of was not done with the dominant view to prefer (*b*). Where, therefore, it is apparent that the debtor was acting in the ordinary course of business (*c*); or in fulfilment of a prior agreement (*d*); or was performing a special contract (*e*), particularly if the nature of such contract be that its discharge by the debtor does not injure those creditors who trusted to the general credit of the debtor (*f*); or that the property the subject-matter of the proceedings came into his possession for a special purpose, so that his rights therein are legal merely and not equitable also—that, in fact, the property is

(*o*) *Cook* v. *Pritchard* (1843), 6 Scott (N. R.), 34; *Brown* v. *Kempton* (1850), 19 L. J. (C. P.) 169; *Kinnear* v. *Walmisley* (1862), 2 F. & F. 756; *Bills* v. *Smith* (1865), 34 L. J. (Q. B.) 68; *Ex parte Hall, Re Cooper* (1882), 19 Ch. D. 580.

(*p*) *Ex parte Reader, Re Wrigley* (1875), L. R. 20 Eq. 763.

(*q*) *Ex parte De Tastet, Re Latham* (1831), Mont. 153; *Green and Cox* v. *Bradfield* (1844), 1 Car. & Kir. 449.

(*r*) *Van Casteel* v. *Booker* (1848), 2 Exch. 691.

(*s*) *Thompson* v. *Freeman* (1786), 1 Term Rep. 155, cited in *Sharp* v. *Jackson*, [1899] A. C. 419.

(*t*) *Brown* v. *Kempton* (1850), 19 L. J. (C. P.) 169; *Graham* v. *Candy* (1862), 3 F. & F. 206.

(*a*) *Re Bell, Ex parte Official Receiver* (1892), 10 Morr. 15, 18.

(*b*) *Strachan* v. *Barton* (1856), 11 Exch. 647; *Johnson* v. *Fesemeyer* (1858), 3 De G. & J. 13; *Bills* v. *Smith* (1865), 34 L. J. (Q. B.) 68; *Ex parte Tempest, Re Craven & Marshall* (1870), 6 Ch. App. 70; *Sharp* v. *Jackson*, [1899] A. C. 419, 425.

(*c*) As by meeting bills as they fall, or even before they fall, due (*Re Clay, Ex parte the Trustee* (1895), 3 Mans. 31). It is otherwise if the bill be presented after maturity (*Re Eaton & Co., Ex parte Viney*, [1897] 2 Q. B. 16).

(*d*) *Harman* v. *Fishar* (1774), Cowp. 117; *Halliday* v. *Holgate* (1867), 17 L. T. 18; *Ex parte Kevan, Re Crawford* (1874), 9 Ch. App. 752.

(*e*) *Dobson* v. *Lockhart* (1793), 5 Term Rep. 133; *Hunt* v. *Mortimer* (1829), 10 B. & C. 44; *Mogg* v. *Baker* (1838), 3 M. & W. 195; *Bills* v. *Smith* (1865), 34 L. J. (Q. B.) 68.

(*f*) *Hunt* v. *Mortimer, supra.*

clothed with a trust (*g*); or that his object was to revive a statute-barred *bonâ fide* debt (*h*); or that he desired to make reparation for a past wrong, as by restoring trust moneys he had misappropriated (*i*), or to avoid evil consequences to himself (*i*); or that he believed that he was bound by contract (*k*); or that he believed that he was under a legal obligation to do as he did, whether such belief was well founded or not (*l*); or that the intention was to correct a *bonâ fide* mistake (*m*); or, *à fortiori*, that he desired to benefit himself (*n*)—in none of these or the like cases will the payment or transfer etc. be set aside. Still less will it be so if it be made under process of law (*o*).

Moral obligation

It will not suffice to prove that the debtor was moved by a mere sense of honour (*p*), or a sense of duty or of moral obligation, or that he acted from motives of kindness or of gratitude (*q*). To repel the presumption of fraudulent intention, the obligation which the debtor conceives that he is satisfying must be an obligation which appears to him, whether in fact it be so or not, legally binding on him, a legal obligation (*r*).

Intention to prefer particular creditor.

In every case the state of mind of the debtor is the paramount consideration (*s*). The intention or view to prefer the creditor as the *causa causans* of the debtor's conduct is the cardinal point round which the whole question turns (*t*); if that intention be shown not to have existed, it is of no importance that the

(*g*) *Toovey* v. *Milne* (1819), 2 B. & Ald. 683; *Edwards* v. *Glyn* (1859), 28 L. J. (Q. B.) 350; *Ex parte Kelly & Co., Re Smith, Fleming & Co.* (1879), 11 Ch. D. 306.

(*h*) *Re Lane, Ex parte Gaze* (1889), 58 L. J. (Q. B.) 373.

(*i*) *Ex parte Stubbins, Re Wilkinson* (1881), 17 Ch. D. 58; *Ex parte Taylor, Re Goldsmid* (1886), 18 Q. B. D. 293; *Ex parte Ball, Re Hutchinson* (1887), 35 W. R. 264; *Sharp* v. *Jackson*, [1899] A. C. 419; *Ex parte Dyer, Re Lake*, [1901] 1 K. B. 710.

(*k*) *Re Vautin, Ex parte Saffery*, [1900] 2 Q. B. 325.

(*l*) *Re Fletcher, Ex parte Suffolk* (1891), 9 Morr. 8; *Re Vingoe & Davies, Ex parte Viney* (1894), 1 Mans. 416; *Re W. Blackburn & Co., Buckley's Case*, [1899] 2 Ch. 725; *Re Vautin, Ex parte Saffery, supra.*

(*m*) *Re Tweedale, Ex parte Tweedale*, [1892] 2 Q. B. 216.

(*n*) *Ex parte Boyle, Re Collett* (1871), 25 L. T. 550; *Re Wilkinson, Ex parte Official Receiver* (1884), 1 Morr. 65; *Re Glanville, Ex parte the Trustee* (1885), 2 Morr. 71; *Ex parte Barnard, Re Arnott* (1889), 6 Morr. 215; *Re Clay & Sons, Ex parte the Trustee* (1895), 3 Mans. 31; *Re the Stenotyper, Ltd.*, [1901] 1 Ch. 250; *Sharp* v. *Jackson*, [1899] A. C. 419, *per* Lord SHAND, at p. 427.

(*o*) *Belcher* v. *Mills* (1835), 2 Cr. M. & R. 150; *Ex parte Brooke, Re Hassall* (1874), 9 Ch. App. 301.

(*p*) For in cases of the restoring of trust moneys improperly dealt with the motive is not merely a sense of honour, if, indeed, that be present at all, but a sense of legal obligation, mixed with, if not overpowered by, the fear of exposure and consequent punishment (*Ex parte Taylor, Re Goldsmid* (1886), 18 Q. B. D. 293; *New, Prance, and Garrard's Trustee* v. *Hunting*, [1897] 2 Q. B. 19).

(*q*) *Re Fletcher, Ex parte Suffolk, supra; Re Vingoe & Davies, Ex parte Viney, supra; Re W. Blackburn & Co., Buckley's Case, supra; Re Jukes, Ex parte Official Receiver*, [1902] 2 K. B. 58.

(*r*) *Re Fletcher, Ex parte Suffolk, supra.* This paragraph must be read subject to the decisions quoted in the preceding paragraph.

(*s*) *Sharp* v. *Jackson*, [1899] A. C. 419.

(*t*) *Crosby* v. *Crouch* (1809), 11 East, 256; *Bills* v. *Smith* (1865), 34 L. J. (Q. B.) 68.

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creditor had knowledge of the debtor's insolvency (*a*), or that the debt was not due (*b*); nor for this purpose is it true that the debtor must be taken to have intended the natural consequences of his act (*c*). And even if an intention to prefer be proved, it must be an intention to prefer "such" creditor, that is, the creditor to whom the payment is actually made (*d*).

Date of petition.

472. The last condition in establishing a fraudulent preference is that the debtor be adjudged bankrupt on a bankruptcy petition presented within three calendar months (*e*) of the date of the transaction sought to be set aside (*f*). In calculating this period, the day on which the petition was presented must be excluded (*g*). The section has no application to a payment made after the presentation of the petition (*h*).

Proof of fraud.

473. Where an act is impeached as a fraudulent preference the onus of proof lies on the trustee in bankruptcy (*i*), even, it seems, if the debtor was insolvent at the time of the payment and knew himself so to be (*j*).

(*a*) *Davison* v. *Robinson* (1857), 3 Jur. (N. S.) 791; *Ex parte Topham, Re Walker* (1873), 8 Ch. App. 614; *Smith* v. *Pilgrim* (1876), 2 Ch. D. 127.

(*b*) *Hartshorn* v. *Slodden* (1801), 2 Bos. & P. 582; *Crosby* v. *Crouch* (1809), 11 East, 256; *Cook* v. *Rogers* (1831), 7 Bing. 438; *Strachan* v. *Barton* (1856), 11 Exch. 647.

(*c*) *Sharp* v. *Jackson*, [1899] A. C. 419, 421.

(*d*) Bankruptcy Act, 1883 (46 & 47 Vict. c. 52), s. 48 (1); *Re Mills, Ex parte Official Receiver* (1888), 5 Morr. 55; *Re Warren, Ex parte Trustee*, [1900] 2 Q. B. 138. See note (*o*), p. 280, *ante*. Although since the passing of the Bankruptcy Act, 1869 (32 & 33 Vict. c. 71), s. 92, repealed by, but on this point re-enacted in, the Bankruptcy Act, 1883 (46 & 47 Vict. c. 52), s. 48 (1), it is no longer necessary to prove that the debtor when he made the payment, or other disposition of property, actually contemplated bankruptcy (*Butcher* v. *Stead* (1875), L. R. 7 H. L. 839) either as an event that in his then condition was inevitable, or as an end at which he consciously aimed (it being sufficient to prove that he acted with the "dominant view" to prefer), yet it is submitted that the fact that the word "preference" is used in the Act implies that the question whether the bankrupt acted in contemplation of bankruptcy is still relevant as one of the factors that go to make up the "view to prefer." The word "preference" means that the person "preferred" is placed in a better position than that in which but for the preference he would have found himself. As, therefore, one who is solvent pays all his debts in full, a debtor cannot "prefer" a creditor unless he thinks it at least likely that otherwise the creditor will not be paid in full, but only rateably with the other creditors, and the avoidance of this result is the benefit or "preference" which the debtor confers. Now, the creditor will be paid rateably only if the debtor become bankrupt; hence it follows that the possibility, if not the probability, of subsequent bankruptcy must have been in the contemplation of the debtor if and when he "preferred," and its being so must be a necessary element in the "view to prefer," and therefore relevant to the existence or non-existence of that view.

(*e*) Interpretation Act, 1889 (52 & 53 Vict. c. 63), s. 3.

(*f*) Bankruptcy Act, 1883 (46 & 47 Vict. c. 52), s. 48 (1).

(*g*) *Re Harvey, Ex parte Harvey & Co.* (1890), 7 Morr. 138; *Re Dawes, Ex parte Official Receiver* (1897), 4 Mans. 117. Thus a petition presented on December 22, the act impeached having happened on September 22, would be in time to avoid the act. And see *Re Hanson, Ex parte Forster* (1887), 4 Morr. 98, which, though a decision on s. 6 (1) of the Act, was followed in *Re Harvey, supra*.

(*h*) *Ex parte Palmer, Re Badham* (1893), 10 Morr. 252.

(*i*) *Ex parte Lancaster, Re Marsden* (1883), 25 Ch. D. 311, 319.

(*j*) *Re Laurie, Ex parte Green* (1898), 5 Mans. 48; but see *Re Eaton & Co., Ex parte Viney*, [1897] 2 Q. B. 16, 17.

The question whether a transaction is a fraudulent preference, —whether the debtor had the intention to defeat the law and to prevent the due distribution of his assets,—is one of fact for the court or jury, if there is one (*k*), who must judge not from one fact, however important, but from all the circumstances of the case (*l*).

A fraudulent preference is now an act of bankruptcy (*m*).

Position of creditor preferred.

474. If a payment or other disposition of property otherwise valid be made in circumstances that amount to a fraudulent preference, the payment, at the time it is made, is a good payment, and so remains unless and until it be set aside as a fraudulent preference. The creditor, therefore, is not a trustee for the trustee in bankruptcy, and the proper order to make is one for repayment (*n*); but if he do not repay, he cannot be committed to prison under the Debtors Act, 1869 (*o*); the remedy must be enforced in the ordinary way (*p*).

Position of trustee.

475. The trustee in bankruptcy ought not to make an application himself, or allow an application to be made in his name, to recover property alleged to have been given to a creditor by way of fraudulent preference, except for the benefit of all the creditors; he ought not to do so simply for the purpose of benefiting a single creditor (*q*).

Position of third persons making title in good faith.

476. Transactions which would be void as fraudulent preferences as between the creditor and the trustee in bankruptcy can be upheld by any person making title in good faith (*r*) and for valuable consideration through or under a creditor of the bankrupt (*s*).

(*k*) *Cook* v. *Rogers* (1831), 7 Bing. 438; *Cook* v. *Pritchard* (1843), 6 Scott (N. R.), 34; *Strachan* v. *Barton* (1856), 11 Exch. 647; *Pennell* v. *Heading* (1862), 2 F. & F. 744; *Bills* v. *Smith* (1865), 34 L. J. (Q. B.) 68.

(*l*) Such as the situation of the bankrupt, the nature of the threats made, the degree of urgency of the creditor, the fact that the debt was not due, the conduct of the bankrupt with other persons at the same time (*ibid.*; *Kinnear* v. *Walmisley* (1862), 2 F. & F. 756).

(*m*) Bankruptcy Act, 1883 (46 & 47 Vict. c. 52), s. 4 (1) (c), which alters the law as it stood both before and after the passing of the Bankruptcy Act, 1869 (22 & 23 Vict. c. 71), s. 6; *Ex parte Stubbins, Re Wilkinson* (1881), 17 Ch. D. 58.

(*n*) *Re Bishop, Ex parte Claxton* (1891), 8 Morr. 221.

(*o*) 32 & 33 Vict. c. 62, s. 4 (3).

(*p*) *Ex parte Hooson, Re Chapman & Shaw* (1872), 8 Ch. App. 231.

(*q*) *Ex parte Cooper, Re Zucco* (1875), 10 Ch. App. 510.

(*r*) That is, without notice, or without the power of obtaining knowledge, of any fraud or fraudulent preference on the part of the bankrupt (*Butcher* v. *Stead* (1875), L. R. 7 H. L. 839, 846; *Tomkins* v. *Saffery* (1877), 3 App. Cas. 213, 237).

(*s*) Bankruptcy Act, 1883 (46 & 47 Vict. c. 52), s. 48 (2). This sub-section appears to have been passed to remove the effect of the decision of the House of Lords in *Butcher* v. *Stead*, *supra*, on the construction of the analogous, but differently worded, proviso in the Bankruptcy Act, 1869 (32 & 33 Vict. c. 71), s. 92; and it appears to restore the common law (*Parker* v. *Patrick* (1793), 5 Term Rep. 175; *White* v. *Garden* (1851), 10 C. B. 919; *Stevenson* v. *Newnham* (1853), 13 C. B. 285).

SUB-SECT. 5. Transactions unaffected by Relation back of Trustee's Title.

SUB-SECT. 5.—*Transactions unaffected by the Relation back of the Trustee's Title.*

Protected transactions.

477. Subject to the provisions of the Bankruptcy Act, 1883 (*t*), dealing with executions and attachments, settlements and fraudulent preferences, nothing in the Act invalidates—(1) any payment by a bankrupt to a creditor; (2) any payment or delivery to the bankrupt; (3) any conveyance or assignment by the bankrupt for valuable consideration; or (4) any contract, dealing, or transaction by or with the bankrupt for valuable consideration, provided in each case that the transaction takes place before the receiving order, and the person party thereto other than the bankrupt had not at the time notice of an available act of bankruptcy (*a*).

Transactions outside protection.

The court will not afford protection to any transaction that is contrary to the policy of the bankruptcy laws, or not entered into in good faith (*b*). Thus a payment made after a petition has been presented which would have been a fraudulent preference if made before the presentation cannot hold good (*c*), and a creditor who takes a transfer of substantially the whole of a debtor's property in payment of a past debt with knowledge that there are other creditors is not entitled to protection (*d*); but a dealing for present value and in good faith may be supported although the transaction be in itself an act of bankruptcy (*e*).

Fraudulent assignment.

In the case of a fraudulent assignment by a debtor of all his assets to a company, such assignment being found to be an act of bankruptcy, debentures issued to the bankrupt's nominees are invalid against the trustee as having been taken with knowledge of the act of bankruptcy, and the transferees of debentures from the bankrupt's nominees are postponed to the trustee as having been put on inquiry (*f*). In like manner, payment of a debt to the trustee under a deed of assignment is no discharge against the claim of the trustee in a bankruptcy founded on the deed (*g*).

Contract etc by or with bankrupt.

478. A "contract, dealing, or transaction by or with the bankrupt" means a proceeding to which he is a party, and not merely

(*t*) 46 & 47 Vict. c. 52, ss. 45—48. The transactions dealt with in these provisions are those relating solely to the bankrupt's property. Thus money provided by a third party and paid to a pressing creditor is not recoverable by the trustee if it never became part of the bankrupt's estate (*Re Rogers, Ex parte Holland & Hannen* (1891), 8 Morr. 243; *Re Drucker* (No. 1), *Ex parte Basden*, [1902] 2 K. B. 55, and on appeal, 237).

(*a*) Bankruptcy Act, 1883 (46 & 47 Vict. c. 52), s. 49.

(*b*) The corresponding sections of the Bankruptcy Act, 1869 (32 & 33 Vict. c. 71), ss. 94, 95, contained the words "in good faith," but these are omitted from the present Act, although mentioned in the marginal note to the section. Good faith is still essential to protect a transaction. See *Re Ashton, Ex parte McGowan* (1891), 8 Morr. 72, as to proof of constructive notice of an act of bankruptcy.

(*c*) *Re Badham, Ex parte Palmer* (1893), 10 Morr. 252.

(*d*) *Re Jukes, Ex parte Official Receiver*, [1902] 2 K. B. 58. Compare *Re Sharp, Ex parte Gundry* (1900), 83 L. T. 416.

(*e*) *Shears* v. *Goddard*, [1896] 1 Q. B. 406, which should be read in conjunction with *Re Hirth*, [1899] 1 Q. B. 612.

(*f*) *Re Slobodinsky, Ex parte Moore*, [1903] 2 K. B. 517.

(*g*) *Davis* v. *Petrie*, [1906] 2 K. B. 786. See *Ponsford, Baker & Co.* v. *Union of London and Smith's Bank, Ltd.*, [1906] 2 Ch. 444, as to the proper method of meeting claims made after an act of bankruptcy.

SUB-SECT. 5. Transactions unaffected by Relation back of Trustee's Title.

passive. Thus a charging order under the Judgments Act, 1838 (*h*), upon stock or shares in court (*i*), or a charging order under the Partnership Act, 1890 (*k*), upon the bankrupt's share in a partnership, will not be effectual (*l*). Similarly notice by a landlord to a sheriff who has levied on the bankrupt's goods, claiming goods comprised in a lease to the bankrupt, is not a dealing with the bankrupt (*m*).

An assignment of a book debt to a creditor ignorant of any act of bankruptcy is valid against the trustee (*n*), but a payment of money by a bankrupt to a person having no knowledge of the act of bankruptcy in settlement of a bet won by him, or as security for other bets made with him, is not valid, as being neither an assignment for valuable consideration nor an assignment made under a legal contract (*o*).

Contract to sell land.

In the case of land which the bankrupt has contracted to sell, the property vests in the trustee subject to the purchaser's equity, and if the purchaser, being unaware of the act of bankruptcy, pays the balance of the purchase-money to the bankrupt, he pays the wrong person, and cannot compel the trustee to execute a conveyance without paying the purchase-money again to him (*p*). Similarly, under a contract where time is of the essence, the purchaser, on receiving notice of the act of bankruptcy, may refuse to complete the sale, and may recover the deposit from the stakeholder (*q*).

Incomplete assignment for value.

479. An assignee for value from the bankrupt of goods or debts which at the commencement of the bankruptcy remain in the order and disposition of the bankrupt may complete his title after the commencement of the bankruptcy by seizure, notice, or other evidence of revocation of consent to such order and disposition, provided he act *bonâ fide* and without notice of the act of bankruptcy. Thus taking possession (*r*) or demanding possession of goods (*s*), or giving notice of assignment of a policy (*t*) or of trade debts by an assignee acting honestly and without notice (*u*), will be effective against the trustee. It is the same with regard to the seizure of goods under a licence to seize (*a*). In the case of an assignment of debts the appointment of a receiver by the assignee is insufficient, unless followed within a reasonable time by notice to the debtors (*b*).

(*h*) 1 & 2 Vict. c. 110.
(*i*) *Re O'Shea*, [1895] 1 Ch. 325.
(*k*) 53 & 54 Vict. c. 39.
(*l*) *Wild* v. *Southwood*, [1897] 1 Q. B. 317.
(*m*) *Ex parte Dorman, Re Lake* (1872), 8 Ch. App. 51.
(*n*) *Re Dunkley & Son, Ex parte Waller*, [1905] 2 K. B. 683.
(*o*) *Ward* v. *Fry* (1900), 85 L. T. 394.
(*p*) *Ex parte Rabbidge, Re Pooley* (1878), 8 Ch. D. 367. See, further, title SALE OF LAND.
(*q*) *Powell* v. *Marshall, Parkes & Co.*, [1899] 1 Q. B. 710.
(*r*) *Young* v. *Hope* (1848), 2 Exch. 105; *Re Wright, Ex parte Arnold* (1876), 3 Ch. D. 70.
(*s*) *Ex parte Montagu, Re O'Brien* (1876), 1 Ch. D. 554.
(*t*) *Re Styan* (1842), 2 Mont. D. & De G. 219.
(*u*) *Re Tillett, Ex parte Kingscote* (1889), 6 Morr. 70; *Rutter* v. *Everett*, [1895] 2 Ch. 872; *Re Seaman, Ex parte Furness Finance Co.*, [1896] 1 Q. B. 412.
(*a*) *Krehl* v. *Great Central Gas Co.* (1870), L. R. 5 Exch. 289.
(*b*) *Rutter* v. *Everett*, [1895] 2 Ch. 872.

SUB-SECT. 5. Transactions unaffected by Relation back of Trustee's Title.

A payment in discharge of a valid execution (*c*) or of a good bill of sale (*d*), whether made with or without knowledge of the act of bankruptcy, is protected against the trustee unless it is made under a fraudulent arrangement with the bankrupt (*e*).

480. An available act of bankruptcy is defined as any act of bankruptcy available for a petition at the date of the presentation of the petition on which the receiving order is made (*f*).

Payment under execution or bill of sale.

Notice of available act of bankruptcy.

Notice of an act of bankruptcy may be direct or constructive. Where an act of bankruptcy has in fact been committed, any communication of the fact made "in a way which ought to induce the hearer as a reasonable man to believe it" is sufficient (*g*); but the nature of the act of bankruptcy need not be specified. A statement that the bankrupt has "committed several acts of bankruptcy" is a good notice of one act (*h*).

Knowledge of petition.

Knowledge of the presentation of a petition usually amounts to notice of an act of bankruptcy, because the petition must either be in itself or be founded on an act of bankruptcy (*i*), and it is the same when several petitions are filed (*k*); but information that a petition has been presented and dismissed does not alone amount to such notice (*l*).

Imputed notice.

Notice is imputed from knowledge of facts that constitute an act of bankruptcy such as a sale under an execution (*m*) or possession by the sheriff for twenty-one days (*n*), or of facts from which the natural inference is that an act of bankruptcy has been committed (*o*), although the person affected deny that he drew such inference (*p*); but a notice of circumstances which may or may not amount to an act of bankruptcy is insufficient (*q*).

Notice of intention.

Notice of intention to commit an act of bankruptcy is clearly ineffectual (*r*), unless it amounts to notice of an intention to suspend payment and is given to a creditor, which is an act of bankruptcy in itself (*s*).

Notice to solicitor.

Notice given to a solicitor may be notice to his client (*t*), and so may notice to the managing clerk who is intrusted with the conduct

(*c*) *Ex parte Mutton, Re Cole* (1872), L. R. 14 Eq. 178.
(*d*) *Ex parte Harris, Re James* (1874), L. R. 19 Eq. 253.
(*e*) *Ex parte Hall, Re Townsend* (1880), 14 Ch. D. 132.
(*f*) Bankruptcy Act, 1883 (46 & 47 Vict. c. 52), s. 168 (1).
(*g*) *Hope* v. *Meek* (1855), 10 Exch. 829, *per* PARKE, B., at p. 845.
(*h*) *Udal* v. *Walton* (1845), 14 M. & W. 254; *Lucas* v. *Dicker* (1880), 6 Q. B. D. 89.
(*i*) *Lucas* v. *Dicker* (1879) 5 C. P. D. 150, and on appeal (1880), 6 Q. B. D. 89.
(*k*) *Re Sedgwick, Ex parte Hobbs* (1892), 9 Morr. 217.
(*l*) *Re O'Shea*, [1895] 1 Ch. 325.
(*m*) *Ex parte Dawes, Re Husband* (1875), L. R. 19 Eq. 438, a case of a previous execution by the same creditor.
(*n*) *Figg* v. *Moore Brothers*, [1894] 2 Q. B. 690.
(*o*) *Smith* v. *Osborn* (1858), 1 F. & F. 267.
(*p*) *Ex parte Snowball, Re Douglas* (1872), 7 Ch. App. 534.
(*q*) *Evans* v. *Hallam* (1871), L. R. 6 Q. B. 713.
(*r*) *Ex parte Halifax* (1842), 2 Mont. D. & De G. 544; *Re Wright, Ex parte Arnold* (1876), 3 Ch. D. 70.
(*s*) Bankruptcy Act, 1883 (46 & 47 Vict. c. 52), s. 4 (1) (h); *Re Morgan, Ex parte Turner* (1895), 2 Mans. 508; *Conway* v. *Nall* (1845), 1 C. B. 643.
(*t*) *Pike* v. *Stephens* (1848), 12 Q. B. 465.

of the matter, but it is otherwise if he is not so intrusted (*a*). The notice must be properly served. Mere delivery at the solicitor's office is not enough (*b*).

Notice to the sheriff's officer in possession is not notice to the execution creditor (*c*).

A notice sent by letter is deemed to be given at the time when in the ordinary course of post it would be delivered, unless there is evidence that it was in fact not read until later (*d*). Notice may also be sent by telegram direct, but the better course is to telegraph to a local solicitor instructing him to serve the notice (*e*).

Where a person claims protection against the relation back of the trustee's title, the onus lies on the person supporting the transaction to prove that it was entered into without notice of a prior available act of bankruptcy, and not on the trustee to prove such notice (*f*).

SUB-SECT. 5. Transactions unaffected by Relation back of Trustee's Title.

Notice to sheriff's officer.

Notice by post.

Burden of proof.

SUB-SECT. 6.—*Rights of Landlord and others to distrain.*

481. The landlord or other person to whom rent is due from the bankrupt may at any time distrain upon the goods of the bankrupt for the rent due to him from the bankrupt, with this limitation, that if the distress be levied after the commencement of the bankruptcy it is available for only six months' rent due prior to the date of the adjudication, but the landlord or other person may prove for the surplus due for which the distress may not have been available (*g*).

Amount for which distress may be levied.

482. The landlord cannot distrain and prove for the same rent (*h*). The landlord's statutory right of distress, as above set out, is not affected by the making of the receiving order (*i*), nor by the fact that the goods have been seized and sold by the sheriff, if they still remain on the premises (*k*). There is no restriction on his right to distrain for rent accruing due after the date of the order of adjudication, even though it be payable in advance (*l*). And where a bankruptcy occurs during the currency of a quarter the landlord may at the end of it distrain for the whole quarter's rent, or for a proportionate part thereof accrued due prior to adjudication (*m*). If rent is payable half-yearly and a receiving order and order of adjudication are made against the tenant before the end of the last half-year, the landlord cannot, in respect of

Restrictions on right of distress.

(*a*) *Re Ashton, Ex parte McGowan* (1891), 8 Morr. 72.
(*b*) *Pike* v. *Stephens* (1848), 12 Q. B. 465.
(*c*) *Ex parte Schulte, Re Matanlé* (1874), 9 Ch. App. 409.
(*d*) *Loader* v. *Hiscock* (1858), 1 F. & F. 132; *Bird* v. *Bass* (1843), 6 Scott (N. R.), 928.
(*e*) *Ex parte Langley, Ex parte Smith, Re Bishop* (1879), 13 Ch. D. 110.
(*f*) *Ex parte Cartwright, Re Joy* (1881), 44 L. T. 883; *Ex parte Schulte, Re Matanlé, supra.*
(*g*) Bankruptcy Act, 1883 (46 & 47 Vict. c. 52), s. 42 (1), as amended by the Bankruptcy Act, 1890 (53 & 54 Vict. c. 71), s. 28. A distress levied on the same day as, but earlier than, the commission of the act of bankruptcy, is levied before the commencement of the bankruptcy (*Re Bumpus, Ex parte White*, [1908] W. N. 90).
(*h*) *Ex parte Grove* (1747), 1 Atk. 104.
(*i*) See and compare Bankruptcy Act, 1883 (46 & 47 Vict. c. 52), ss. 9, 42; *Re Howells, Ex parte Mandleberg* (1895), 2 Mans. 192. See *Ex parte Till, Re Mayhew* (1873), L. R. 16 Eq. 97.
(*k*) *Re Davis, Ex parte Trustees of Pollen's Estate* (1885), 3 Morr. 27.
(*l*) *Ex parte Hale, Re Binns* (1875), 1 Ch. D. 285.
(*m*) Bankruptcy Act, 1883 (46 & 47 Vict. c. 52), s. 42 (1); *Re Howell, Ex parte Mandleberg & Co.*, [1895] 1 Q. B. 844; *Bishop of Rochester* v. *Le Fanu*, [1906]

SUB-SECT. 6. Rights of Landlord and others to distrain.

rent accrued due prior to the adjudication order, obtain by distress levied before the end of the half-year more than six months of the overdue rent (*n*).

Goods distrainable.

The limitation of the landlord's right is only for the benefit of the creditors, and does not extend to goods not belonging to the bankrupt (*o*), but a mortgagee whose goods have been seized and sold may claim to stand in the place of the landlord against other goods of the bankrupt liable to distress (*p*).

Landlord's claim against sheriff.

483. Where the sheriff has seized and sold the goods of a debtor in pursuance of a writ of execution in respect of a judgment for a sum exceeding £20, and during the fourteen days for which he is obliged to hold the proceeds he receives notice of a receiving order made against the debtor, the claim of the official receiver or trustee to such proceeds will be postponed to any claim which the landlord has made on the sheriff for arrears of rent, not exceeding one year's, of the premises where the goods are (*q*).

The landlord can only claim from the sheriff under this provision rent which accrued due at the time of the taking of the goods in execution, not that which accrued afterwards (*r*).

Neglect to distrain.

484. If a landlord neglects to distrain for his rent, he may be postponed to a solicitor who obtains a charging order in respect of his costs on property recovered or preserved by him (*s*).

Revival of right to distrain.

Where a landlord has agreed to accept a reduced rent if punctually paid and there is a default, his right to distrain for the original rent in the bankruptcy will revive (*t*).

Agreement not to distrain.

The landlord cannot, by agreeing with the tenant after the commencement of his bankruptcy not to distrain but to take over the goods at a valuation, become entitled to retain more than six

2 Ch. 513; *Ex parte Dressler, Re Solomon* (1878), 9 Ch. D. 252; *Re Leeks*, [1902] 2 Ir. 339. As to landlord's right of proof, see p. 221, *ante*.

(*n*) *Re Wilson, Ex parte Lord Hastings* (1893), 10 Morr. 219.

(*o*) *Brocklehurst* v. *Lawe* (1857), 7 E. & B. 176; *Railton* v. *Wood* (1890), 15 App. Cas. 363.

(*p*) *Ex parte Stephenson, Re Stephenson* (1847), De G. 586.

(*q*) Bankruptcy Act, 1890 (53 & 54 Vict. c. 71), s. 11 (2); *Re Mackenzie, Ex parte Sheriff of Hertfordshire*, [1899] 2 Q. B. 566. *Semble*, the same rule would apply where the goods seized under an execution have not been sold, but remain in the hands of the sheriff (*ibid.*, and Bankruptcy Act, 1890, s. 11 (1)). In short, the express provisions of the Landlord and Tenant Act, 1709 (8 Anne, c. 14), in favour of the landlord are not interfered with by the Bankruptcy Acts; see title LANDLORD AND TENANT. See also *Re Driver, Ex parte Official Receiver* (1899), 43 Sol. Jo. 705, reversing 80 L. T. 840, where the sheriff sold for the official receiver.

(*r*) *Re Davis, Ex parte Trustees of Pollen's Estate* (1885), 3 Morr. 27. The Landlord and Tenant Act, 1709 (8 Anne, c. 14), does not apply to executions in the county court, which are regulated by the County Courts Act, 1888 (51 & 52 Vict. c. 43), s. 154, and, where there is also a claim by the landlord, by s. 160. The high bailiff is entitled to separate possession fees where there are proceedings under each section (*Re Broster, Ex parte Pruddah*, [1897] 2 Q. B. 429). See title COUNTY COURTS.

(*s*) *Re Suffield and Watts, Ex parte Brown* (1888), 20 Q. B. D. 693. As to the landlord's right of distress under the Agricultural Holdings Act, 1883 (46 & 47 Vict. c. 61), s. 44, and in respect of rent which became due more than a year before the distress, see *Ex parte Bull, Re Bew* (1887), 18 Q. B. D. 642, and title AGRICULTURE, Vol. I., pp. 255, 256.

(*t*) *Re Smith & Hartogg* (1895), 2 Mans. 400.

months' rent as against the trustee (*a*). On the other hand, where the landlord, having distrained, takes over the goods under an agreement which is subsequently set aside as an act of bankruptcy, the trustee, having obtained judgment against the landlord for damages for conversion, must give credit for the sum he would have had to pay to obtain possession at the commencement of the bankruptcy (*b*).

Persons possessing right of distress.

485. The persons to whom the above provisions give priority by way of a right to distrain include not only landlords in the ordinary sense of the term, but also any person who stands in a position analogous to that of a landlord to a person by whom that which is called rent is payable (*c*).

Mortgagee.

Thus a mortgagee to whom the mortgagor has attorned tenant would, where the attornment clause is valid, have a right of distress for rent payable under such clause (*c*). In effect the exercise of the right of distress by a mortgagee has become practically obsolete (*d*).

It is no objection that the rent varies from time to time, as, for instance, the arrears payable under a building society's mortgage (*e*), or that the mortgagor has already attorned tenant to a prior mortgagee (*f*). Proceeds of distress not required to discharge arrears of interest may, subject to any provision to the contrary, be applied in reduction of principal (*g*).

(*a*) *Re Griffith, Ex parte Official Receiver* (1897), 4 Mans. 217; but see *Re Wilson, Ex parte Lord Hastings* (1893), 10 Morr. 219, where in special circumstances the landlord was allowed to retain more than six months' rent as against the value of growing crops and other things taken over at a valuation.

(*b*) *Cox* v. *Liddell* (1895), 2 Mans. 212.

(*c*) *Ex parte Hill, Re Roberts* (1877), 6 Ch. D. 63. With regard to the validity of an attornment clause, the Bills of Sale Act, 1878 (41 & 42 Vict. c. 31), which came into operation January 1, 1879, must now be taken into account. As to this see title BILLS OF SALE.

Where the attornment clause in a mortgage deed is not affected by the Bills of Sale Act, 1878 (41 & 42 Vict. c. 31), the question of its validity will depend on whether there was a real tenancy at a real and fair rent, or whether the tenancy was a sham one and the transaction a mere device to give the mortgagee in case of bankruptcy a security on chattels which belong to the creditors generally. See, on the one hand, *Ex parte Williams, Re Thompson* (1877), 7 Ch. D. 138, where the mortgage debt was £55,000, and the mortgagor attorned tenant at the rent of £20,000 a year; *Ex parte Jackson, Re Bowes* (1880), 14 Ch. D. 725, where the mortgage debt was £7,090 and the rent £8,000; and, on the other hand, *Re Stockton Iron Furnace Co.* (1879), 10 Ch. D. 335; *Ex parte Voisey, Re Knight* (1882), 21 Ch. D. 442. There may be an attornment to more than one mortgagee (*Ex parte Punnett, Re Kitchin* (1880), 16 Ch. D. 226). An attornment clause will not deprive the mortgagee of his right as a mortgagee to fixtures affixed to the premises after the mortgage (*ibid.*).

The proceeds of a distress under such a clause may be applied to payment of principal as well as interest, and that, too, though the yearly rent is equal in amount to the interest on the debt (*Ex parte Harrison, Re Betts* (1881), 18 Ch. D. 127).

Where the parties agreed that a tenancy from year to year should be created, but that the mortgagee should have a right to determine it at any time, the tenancy was not thereby made a tenancy at will so as to be determined by liquidation proceedings on the part of the mortgagor under s. 125 of the Bankruptcy Act, 1869 (32 & 33 Vict. c. 71) (*Re Threlfall, Ex parte Queen's Benefit Building Society* (1880), 16 Ch. D. 275). See title MORTGAGE.

(*d*) *Re Willis, Ex parte Kennedy* (1888), 21 Q. B. D. 384. Upon inquiry at the Bills of Sale Office it has been ascertained that only one or two attornments have been registered within the last fifteen years.

(*e*) *Ex parte Voisey, Re Knight* (1882), 21 Ch. D. 442.

(*f*) *Ex parte Punnett, Re Kitchin* (1880), 16 Ch. D. 226.

(*g*) *Ex parte Harrison, Re Betts* (1881), 18 Ch. D. 127.

SUB-SECT. 6. Rights of Landlord and others to distrain.

Gas company.

A gas company whose special Act authorises it to levy by distress sums due for gas supplied, after the issue of a warrant for distress by a magistrate, is not in the position of a landlord (*h*); but it would be otherwise if the company were authorised to recover rent or charges for gas by the same means as landlords may recover rent in arrear (*i*).

Preferential claims.

486. In the event of a landlord or other person distraining or having distrained on any goods of a bankrupt within three months next before the receiving order, preferential claims for rates, taxes, and wages become a first charge on the goods distrained or the proceeds of sale thereof, but in respect of any money paid under such charge the landlord or other person has the same right of priority as the person to whom the money is paid (*j*).

The landlord is not given a right of distress for the amount he has to pay over. The result is that the landlord's claim so far as regards this payment no longer has priority over the costs of administration (*k*), but, on the other hand, he gets a preferential claim on all the assets, whether distrainable or not.

Administration.

The limitation of the landlord's power of distress is expressly extended to proceedings under an order for the administration in bankruptcy of the estate of a deceased insolvent, the order being equivalent to the order of adjudication (*l*); but it does not apply to an order for administration in the Chancery Division (*m*).

SECT. 15.—*Summary Administration of Small Estates.*

SUB-SECT. 1.—*In General.*

Conditions under which order made.

487. An order for summary administration of a debtor's estate may be made after the presentation of a petition by or against him, when the court is satisfied by affidavit or otherwise, or by the official receiver's report (*n*), that the debtor's property is not likely to exceed in value £300 (*o*).

Modifications of Bankruptcy Acts.

488. The making of the order renders the provisions of the Bankruptcy Acts which apply to ordinary bankruptcies subject to

(*h*) Even though the Gasworks Clauses Act, 1847 (10 & 11 Vict. c. 15), s. 16 of which speaks of the sum due as "rent," is incorporated (*Ex parte Hill, Re Roberts* (1877), 6 Ch. D. 63).

(*i*) *Ex parte Birmingham and Staffordshire Gas Light Co., Re Fanshaw & Yorston* (1871), L. R. 11 Eq. 615; *Ex parte Harrison, Re Peake* (1884), 13 Q. B. D. 753.

(*j*) Preferential Payments in Bankruptcy Act, 1888 (51 & 52 Vict. c. 62), s. 1 (4).

(*k*) See *Re Chapman, Ex parte Goodyear* (1894), 10 T. L. R. 449.

(*l*) Bankruptcy Act, 1883 (46 & 47 Vict. c. 52), ss. 42 (2), 125.

(*m*) *Re Fryman* (1888), 38 Ch. D. 468.

(*n*) This is *primâ facie* evidence (*Re Horniblow, Ex parte Official Receiver* (1885), 2 Morr. 124). See Bankruptcy Rules, Appendix, Forms, No. 44. As to official receiver's interview with debtor, see *ibid.*, r. 324 (2). All proceedings after the order are marked "Summary Case" (*ibid.*, r. 273 (2)).

(*o*) Bankruptcy Act, 1883 (46 & 47 Vict. c. 52), s. 121. A similar order may be made when the court by which a receiving order is made under *ibid.*, s. 103, or the court to which the matter is transferred, is satisfied, in manner aforesaid, that the debtor's property, after deduction of property in the hands of secured creditors, debts enforceable by distraint, the costs of execution under s. 46 (1) of that Act (now represented by s. 11 (1) of the Bankruptcy Act, 1890 (53 & 54 Vict. c. 71)), and preferential debts, is not likely to exceed in value £300 (Bankruptcy Rules, r. 362). As to transfer in cases under s. 103 of the Bankruptcy Act, 1883, see p. 345, *post*, and Bankruptcy Rules, rr. 360, 361.

certain modifications. These modifications, however, do not in any way affect the provisions of the Acts relating to the examination and discharge of the debtor (*p*).

The above modifications are as follows:—

Trustee.

If there is an adjudication the official receiver is trustee, subject to the right of the creditors by special resolution to appoint another trustee, in which case the bankruptcy proceeds as if no order had been made (*q*).

Committee of inspection.

There is no committee of inspection, but the official receiver may do, with the permission of the Board of Trade, what a trustee may do with the permission of a committee of inspection (*r*).

Advertisements etc.

There is no advertisement in a local paper except with the permission of the Board of Trade, and no application for a jury is entertained, the court determining all questions of law and fact (*s*).

Limit of jurisdiction.

The limit of amount, to which the exercise of jurisdiction by a county court is subject, is not affected (*t*).

Adjudication.

Again, if no proposal for a composition or scheme is lodged with the official receiver within the prescribed time, or such extended time as he may fix, or if the court is satisfied by a report of the official receiver, which will be read as *primâ facie* evidence, that the debtor has absconded, or does not intend to make any proposal, or that a proposal made is not reasonable or calculated to benefit the creditors, or if on the conclusion of the public examination the court considers that a composition or scheme ought not to be sanctioned by reason of the debtor's conduct, the court may forthwith adjudge the debtor bankrupt (*a*).

Payments.

All payments are made into the Bank of England (Bankruptcy Estates Account) unless the Board of Trade otherwise orders (*b*).

Meetings of creditors.

Meetings of creditors are to be held, unless the official receiver for special reasons otherwise determines, in the town or place where the court usually sits, or where the office of the official receiver is situate, and the first meeting may, if expedient, be held on the day of the public examination, or on any other day fixed by the official receiver. If a quorum is not present the meeting need

(*p*) Bankruptcy Act, 1883 (46 & 47 Vict. c. 52), s. 121. See pp. 140, 241, *ante*. Where in proceedings for the administration of a deceased debtor's estate under *ibid.*, s. 125, a meeting is called for the appointment of a trustee, and the estate is not likely to exceed £300 in value, the provisions of s. 121 of that Act are to apply (Bankruptcy Rules, r. 279 A). See p. 96, *ante*.

(*q*) Bankruptcy Act, 1883 (46 & 47 Vict. c. 52), s. 121. After the release of a trustee the creditors cannot appoint another (*Re Leach, Ex parte Barnes*, [1900] 2 Q. B. 649). The order, coupled with the adjudication order, does not amount to a "conveyance" requiring registration within the Middlesex Registry Act, 1703 (7 Anne, c. 20) (*Re Calcott and Elvin*, [1898] 2 Ch. 460).

(*r*) Bankruptcy Act, 1883 (46 & 47 Vict. c. 52), s. 121; *Re Duncan, Ex parte Duncan*, [1892] 1 Q. B. 331. As to acts requiring permission, see pp. 122 *et seq.*, *ante*.

(*s*) Bankruptcy Rules, r. 273 (1), (3).

(*t*) *Re Billing, Ex parte Official Receiver* (1902), 86 L. T. 689. The general powers of the county court are set out in s. 102 (1) of the Bankruptcy Act, 1883 (46 & 47 Vict. c. 52).

(*a*) Bankruptcy Rules, r. 273 (4), (5); Bankruptcy Act, 1890 (53 & 54 Vict. c. 71), s. 3.

(*b*) Bankruptcy Rules, r. 273 (6).

SUB-SECT. 1. In General.

not be adjourned. Notices of meetings other than the first, or of sittings of court, are only sent to creditors whose debts or claims exceed £2 (*c*).

Application for discharge.

On an application by the bankrupt for a discharge the official receiver's certificate does not include, nor is notice sent to, creditors whose debts do not exceed £2 (*d*).

Statement of accounts.

In lieu of the copy of accounts to be filed by a trustee (*e*), a statement is filed showing the position of the estate analogous, as far as may be, to the statement which accompanies a notice of dividend and application for release by the trustee (*f*).

Realisation of estate.

The estate must be realised as speedily as possible, and if possible distributed when realised in a single dividend, but the period of four months for payment of a first dividend in an ordinary bankruptcy is extended to six months (*g*).

Costs.

The scale of solicitors' costs is lower than in ordinary cases (*h*), and the costs and charges of persons employed by the official receiver, other than solicitors, may, save when the Board of Trade requires taxation, be allowed and paid without taxation if they are within the prescribed scale (*i*).

Disclaimer.

A lease may be disclaimed by the trustee or official receiver without leave where the bankrupt has not sublet or created a charge or mortgage on the lease (*k*).

SUB-SECT. 2.—*Administration Order in County Court.*

Conditions under which county court acts.

489. The ordinary procedure of bankruptcy applies only to cases of debtors whose debts are not less than £50 in amount. In order to enable debtors, mainly of the wage-earning class, whose debts do not exceed £50 in all, to obtain freedom from their liabilities while making just provision for their creditors, there has been established under the Bankruptcy Acts a system of a kind of compulsory composition with creditors carried out under the supervision of the county courts (*l*).

When order made.

490. The procedure is as follows: When judgment has been obtained in a county court against a debtor, and he alleges that he is unable to pay the amount forthwith, and that his whole indebtedness does not exceed £50, inclusive of the debt for which judgment was obtained, the court may make an order for the administration of the debtor's estate and the payment of his debts by instalments or otherwise either in full or to such extent as to the county court appears to be practicable, and subject to such

(*c*) Bankruptcy Rules, r. 273 (7), (8), (11).
(*d*) *Ibid.*, r. 273 (9).
(*e*) Under s. 78 (4) of the Bankruptcy Act, 1883 (46 & 47 Vict. c. 52).
(*f*) Bankruptcy Rules, r. 273 (10), Appendix, Forms, No. 122.
(*g*) *Ibid.*, r. 273 (12), (13).
(*h*) See *ibid.*, r. 112 (2) and Appendix, No. 1 of Scale of Costs.
(*i*) *Ibid.*, r. 273 (14).
(*k*) *Ibid.*, r. 320 (1). In such case the court has no jurisdiction to order compensation to the landlord for the trustee's occupation of the premises, though such occupation has been of benefit to the estate (*Re Sandwell, Ex parte Zerfass* (1885), 14 Q. B. D. 960). See, as to disclaimer, pp. 191 *et seq.*, *ante*.
(*l*) See generally s. 122 of the Bankruptcy Act, 1883 (46 & 47 Vict. c. 52), and the Bankruptcy (Administration Order) Rules, 1902, made thereunder.

conditions as to the debtor's future earnings or income as the court thinks just (*m*); and a like order may be made where an application is made to commit such a small debtor for non-payment of the judgment debt (*n*). Even if the debts are subsequently found to exceed £50 the order does not become invalid, though the court may set it aside (*o*).

Request.

A debtor who desires to obtain an administration order must file with the registrar a request and statement in the prescribed form (*p*).

The request must show whether payment in full or a composition is proposed, and in the latter case the amount in the pound and the monthly or other instalments by which the debtor proposes to pay. The statement must contain the names, addresses and descriptions of all the creditors, and of persons other than the debtor (if any) who are liable for any of the debts, and of creditors having power to distrain, whether for rent, rates or taxes, and of secured creditors, together with the particulars and estimated value of their security. If judgment has been obtained or proceedings are pending in any inferior court the order or summons must be produced. The debtor must make an affidavit that to the best of his knowledge, information, and belief the names of all his creditors, and the debts, are truly set out in the list produced by him, and that the facts in his request and statement are true (*q*).

Stay of other proceedings after filing of request.

491. After the filing of a request for an administration order, and before it can be heard, the county court judge or registrar may stay proceedings on any execution, judgment summons, or order of commitment against the debtor in respect of any debt scheduled to the request, whether issued by that court or by another inferior court and sent for execution to that court; but in such case the costs of any such process incurred by the creditor before the stay may be allowed and added to the creditor's debt (*r*).

Objection to scheduled debts or to composition proposed.

492. A creditor who desires to object to any debt set out by the debtor in the list which he is required to attach to his request and verify, or to the amount of the composition or the instalments

(*m*) Bankruptcy Act, 1883 (46 & 47 Vict. c. 52), s. 122 (1). As to notice of order sent to debtor and creditors respectively, see Bankruptcy (Administration Order) Rules, 1902, r. 8, and Forms, Nos. 5 and 6. Notice of the order is also sent to the registrar of county court judgments, and posted at the county court office in the district where the debtor resides (Bankruptcy Act, 1883, s. 122 (9)).

(*n*) Bankruptcy Rules, r. 358. See p. 345, *post*.

(*o*) Bankruptcy Act, 1883 (46 & 47 Vict. c. 52), s. 122 (2). The Bankruptcy Act, 1883, s. 121, provides that an administration order shall be carried out by general rules, and the rules at present in force are the Bankruptcy (Administration Order) Rules, 1902, the words in which have the same meaning (subject to the context) as in the County Courts Act, 1888 (51 & 52 Vict. c. 43), and rules thereunder (rule 28).

(*p*) For request and statement by the debtor, which, if he is illiterate, will be filled up by the registrar or his clerk, see Bankruptcy (Administration Order) Rules, 1902, r. 2, and Appendix, Form No. 1.

(*q*) *Ibid.*, r. 3. For form of notice of hearing (10 clear days), to be sent by the registrar to the creditors and to the debtor, see *ibid.*, r. 4, and Appendix, Forms, Nos. 2 and 3. The debtor must give notice of any change of address (*ibid.*, r. 27).

(*r*) *Ibid.*, r. 6.

SUB-SECT. 2. Administration Order in County Court.

which by his request the debtor proposes to pay, must send five clear days' notice to the registrar and to the debtor, and to the creditor whose debt is objected to, stating the grounds of his objection; but by leave of the judge an objection may be heard without notice (*s*).

Hearing.

493. At the hearing of the request the debtor must, as a rule, attend and answer all questions put or allowed by the judge, and any creditor, whether he has received notice or not, may attend and prove his debt, and, if he has given the necessary notices, may object to any debt, or to the composition or instalments, but the debts scheduled by the debtor in his list are taken to be proved unless objected to or disallowed by the judge (*t*).

Debts objected to are proved in the same way as on the hearing of an ordinary summons in the county court, but the judge may adjourn the proof and, if he thinks fit, the further consideration of the request. Any creditor, including, by leave of the judge, a creditor proof of whose debt has been adjourned, and, by leave, any person on behalf of any such creditor, is entitled to be heard and to adduce evidence (*w*).

Refusal of order.

494. The court may refuse to make an order on proof of facts which, if proved in an ordinary bankruptcy, would oblige the court to refuse, suspend, or attach conditions to the debtor's discharge (*a*). No order will be made under which the payment of instalments would extend over more than six years from the date of the order (*b*).

Transfer of proceedings.

Where the county court in which a judgment has been obtained is of opinion that it would be inconvenient that that court should administer the debtor's estate, the request and a certificate of the judgment is sent to the county court within whose district the debtor or a majority of his creditors reside, and thereupon the latter court proceeds with the administration (*c*).

SUB-SECT. 3.—*Effect of Order by County Court.*

Remedies of creditors.

495. An administration order does not divest a debtor of his property (*d*), but after the making of it no creditor in respect of a debt notified by the debtor has, except with the leave of and on terms imposed by the court, any remedy against the person or property of the debtor in respect of his debt; and any county court or inferior court in which proceedings are pending in respect of such debt may stay them, but may allow the costs already incurred to be added to the debt (*e*). This protection to the debtor against

(*s*) Bankruptcy (Administration Order) Rules, 1902, r. 5.
(*t*) *Ibid.*, r. 7 (1), (2), (3), (5).
(*w*) *Ibid.*, r. 7 (4), (6).
(*a*) *Ibid.*, r. 7 (7). See p. 251, *ante*.
(*b*) *Ibid.*, r. 7 (8).
(*c*) Bankruptcy Act, 1883 (46 & 47 Vict. c. 52), s. 122 (3); Bankruptcy (Administration Order) Rules, 1902, r. 7 (9). Notice is given to the debtor of the transfer (*ibid.*). So, too, where a request is made to the registrar for an order, and it appears that the debtor or a majority of the creditors reside in another county court district, he reports the matter to the judge, who may make an order of transfer as above mentioned (*ibid.*, r. 4).
(*d*) *Pearson* v. *Wilcock*, [1906] 2 K. B. 440.
(*e*) Bankruptcy Act, 1883 (46 & 47 Vict. c. 52), s. 122 (5). It would seem that even a subsequent creditor might get leave to proceed with an execution

SUB-SECT. 3. Effect of Order by County Court.

the process of creditors during the currency of the administration order extends to the process of creditors whose debts have accrued due since the date of the order (*f*).

Thus the effect of the order in practice is that on the one hand while it lasts the debtor has to pay into court the instalments prescribed by the order at the times thereby directed, and on the other hand as long as he keeps up the instalments he is protected from proceedings by his creditors and when the order is worked out becomes free from his debts altogether.

Execution.

496. Where it appears to the registrar that property of the debtor exceeds in value £10, then at the request of any creditor, and without fee, he issues execution against the debtor's goods, but the household goods, wearing apparel, and bedding of the debtor and his family, and the tools and implements of the debtor's trade will be protected to the value of £20 in the aggregate (*g*).

SUB-SECT. 4.—*Enforcement, Suspension and Rescission of Order made by County Court.*

Committal for default.

497. An order, if not complied with, can be enforced by committal to prison of the defaulting debtor. If the debtor makes default in paying an instalment due under the order he is deemed, unless the contrary is proved, to have had since the date of the order means to pay the instalment and to have refused or neglected to pay it (*h*).

Person appointed to have conduct of order.

The judge may from time to time appoint a person to have the conduct of and to enforce the order, or in a proper case to apply to rescind it. In some county courts the person to whom the conduct of the order is given is one of the officers of the court.

Judgment summons to enforce order.

For the purpose of enforcing the order it is the duty of the person who has the conduct of the order, when default is made in payment of an instalment, to apply for the issue of a judgment summons against the debtor or, if the default has been occasioned by misfortune, to apply for a suspension of the order (*i*).

Rescission.

498. Rescission of the order may be ordered by the judge when two or more instalments are in arrear (*k*); when the debtor has

without rescission of the administration order; see *Pearson* v. *Wilcock*, [1906] 2 K. B. 440. Compare *Re Frank*, [1894] 1 Q. B. 9, where, it would seem, the court placed too limited a view on the power of the court in that respect.

(*f*) *Pearson* v. *Wilcock*, *supra*.

(*g*) Bankruptcy Act, 1883 (46 & 47 Vict. c. 52), s. 122 (4). An execution under this provision is practically unknown.

(*h*) *I bid.*, s. 122 (6).

(*i*) Bankruptcy (Administration Order) Rules, 1902, rr. 13, 14, 17, and Appendix, Forms, No. 8. The summons is served personally five clear days before return day. If the court finds that the debtor had not means to pay the instalment it may direct that the administration order shall be deemed to have been suspended during the period of default, or make a new order for payment by instalments (*ibid.*, and Bankruptcy Act, 1883 (46 & 47 Vict. c. 52), s. 122 (6)). If a commitment order is made (Form No. 9), but suspended for a time, the administration order will be suspended during the same time (Bankruptcy (Administration Order) Rules, 1902, r. 19). In calculating arrears due, instalments accruing during the period of suspension are not reckoned (*ibid.*, r. 20).

(*k*) When the debtor is unable to pay, through illness or otherwise, the registrar may suspend the order till the next sitting of the court, when the judge may make an order as above (*ibid.*, r. 17).

SUB-SECT. 4. Enforcement etc. of Order of County Court.

wilfully either inserted in his report the wrong name and address of any creditor, or omitted the name of any creditor; or where he has obtained the order by fraud or misrepresentation, or since its date has obtained credit to the extent of £2 without informing the creditor of the order, or since its date has had a receiving order made against him (*l*).

Effect of rescission.

499. The rescission will be without prejudice to anything already done, and any money paid into court may be dealt with as if no rescission had taken place. Notice of the rescission is sent to the debtor and creditors, and to every county court where to the registrar's knowledge proceedings are pending or judgment has been obtained against the debtor (*m*).

SUB-SECT. 5.—*Proofs and Dividends under Order made by County Court.*

Schedule of debts.

500. Any creditor, on proving his debt before the registrar, is entitled to be scheduled as a creditor for it, but any creditor may object to a scheduled debt or to the amount of the proposed instalments (*n*).

Objection to proofs.

This is done by giving notice in writing of the objection, and the grounds of it, to the registrar, after which the objection is heard *ex parte* by the judge, who, if he does not dismiss it, orders it to be heard on notice to such persons and on such terms as he thinks fit.

Time for objections.

A creditor to whom notice of the debtor's request has been sent cannot object to a debt or to the amount of instalments unless within two months from the date of the administration order he satisfies the court that he did not receive such notice or other reasonable notice (*o*).

Subsequent creditors.

A subsequent creditor sends notice of his claim to the registrar, who gives notice thereof to the debtor (*p*). If the debtor does not dispute the claim within the time allowed it is deemed to be proved and the debtor is so informed (*q*), but if he does dispute it the judge on a day appointed may either disallow it, or allow it, or part of it, subject to the priority as to dividend of those who were creditors scheduled before the date of the administration order (*r*).

Appropriation of proceeds.

501. Money paid into court is appropriated, first, in paying the plaintiff's costs, secondly, in satisfaction of the costs of administration (not exceeding 2*s.* in the pound on the total amount of the debts), and lastly in payment of the debts (*s*). The costs of

(*l*) Bankruptcy (Administration Order) Rules, 1902, r. 15 (1). The rescission may take place on the hearing of a judgment summons, or on the application of the person having conduct of the order (*ibid.*, r. 15 (2)). See Form No. 13 for form of notice, which need not be given when a receiving order has been made.

(*m*) *Ibid.*, r. 16, Form No. 15. Where a judge has refused to make an administration order or has rescinded one, his leave must be obtained before the debtor can file in any court a second request for an administration order (*ibid.*, r. 18).

(*n*) Bankruptcy Act, 1883 (46 & 47 Vict. c. 52), s. 122 (10), (11).

(*o*) Bankruptcy (Administration Order) Rules, 1902, r. 9.

(*p*) *Ibid.*, Appendix, Forms, No. 10.

(*q*) *Ibid.*, Appendix, Forms, No. 11.

(*r*) *Ibid.*, Appendix, Forms, Nos. 10, 12, and rr. 10, 11, 12, 21.

(*s*) Bankruptcy Act, 1883 (46 & 47 Vict. c. 52), s. 122 (8), and Bankruptcy (Administration Order) Rules, 1902, rr. 22, 23. The registrar sends notice to the plaintiff when enough has been received for his costs, and to the creditors of dividends (*ibid.*, r. 24 (1), Appendix, Forms, No. 17). The payments out are

administration include the fees payable to the Treasury (*a*). A subsequent creditor may, on proving his debt before the registrar, be scheduled, but receives no dividend till the creditors scheduled before the date of the order have been paid to the extent provided by the order (*b*). SUB-SECT. 5. Proofs etc. under Order of County Court.

A list of dividends unclaimed for five years, with names of persons entitled to them, will be posted in the registrar's office and in court, and if not claimed within six years thereafter will be accounted for to the Treasury, and any person claiming to be entitled to any sum so accounted for may apply to the judge, who if satisfied as to his title may make an order for payment thereof to him (*c*). Unclaimed dividends.

502. The administration order will be superseded and the debtor discharged from his debts to the scheduled creditors when the amount received by the court is sufficient to pay to them the amounts provided by the order, along with the costs of the plaintiff and of the administration (*d*). Discharge.

SECT. 16.—*Appeals.*

SUB-SECT. 1.—*In General.*

503. Orders in bankruptcy matters are, except in cases specially excluded (*e*), subject to appeal at the instance of any person aggrieved, even if he has not appeared in the court below (*f*). Orders which are subject to appeal.

A person aggrieved means a person who has suffered a legal grievance, a man against whom a decision has been pronounced which has wrongfully deprived him of something, or wrongfully refused him something, or wrongfully affected his title to something; it is not sufficient that he has lost something which he would have obtained if another order had been made (*g*). Persons who may appeal.

A bill of sale holder may appeal against a receiving order where the alleged act of bankruptcy was the execution by the debtor of the Appeal against receiving order.

made in accordance with county court rules, and accounts are kept as directed by the Treasury (*ibid.*, rr. 24 (2), 25).

(*a*) Order as to Fees and Percentages, Table E. The high scale of Treasury fees is found to militate against the successful working of the system, inasmuch as 2*s.* in the pound has to be paid in fees, besides costs, before the creditors get anything. In computing a registrar's salary, each creditor scheduled, not being a judgment creditor, counts as a plaint (Bankruptcy Act, 1883 (46 & 47 Vict. c. 52), s. 122 (14)).

(*b*) Bankruptcy Act, 1883 (46 & 47 Vict. c. 52), s. 122 (12). These subsequent creditors rank *pari passu inter se.* No dividend is to be disturbed by reason of any subsequent proof (Bankruptcy (Administration Order) Rules, 1902, r. 21).

(*c*) Bankruptcy (Administration Order) Rules, 1902, r. 26.

(*d*) Bankruptcy Act, 1883 (46 & 47 Vict. c. 52), s. 122 (13).

(*e*) Bankruptcy Rules, rr. 129—134; *Re Lamb, Ex parte Board of Trade,* [1894] 2 Q. B. 805; see also *Re Ashwin, Ex parte Ashwin* (1890), 25 Q. B. D. 271) (debtor committed for contempt). It would seem that there is an appeal from an interpleader order made by a bankruptcy judge (*Ex parte Streeter, Re Morris* (1881), 19 Ch. D. 216, decided under a corresponding section of the Bankruptcy Act, 1869).

(*f*) Bankruptcy Act, 1883 (46 & 47 Vict. c. 52), s. 104; *Re Michael, Ex parte Michael* (1891), 8 Morr. 305.

(*g*) *Ex parte Official Receiver, Re Reed, Bowen & Co.* (1887), 19 Q. B. D. 174; and see *Ex parte Sidebotham, Re Sidebotham* (1880), 14 Ch. D. 458, *per* JAMES, L.J., at p. 465, holding that a bankrupt was not entitled to appeal against the refusal of the court to act on the comptroller's report as to the misfeasance of the trustee; *Re Lamb, supra.*

SUB-SECT. 1. In General.

bill of sale (*h*), and a trustee under a deed of arrangement may appeal from a receiving order when the act of bankruptcy alleged is the execution of the deed (*i*). But the executor of a deceased partner, with whose knowledge the partnership business has been carried on since his testator's death, or the receiver in a partnership action, has no right to appeal against a receiving order made against the firm (*k*).

Appeal by creditor.

An unpaid creditor may appeal against an order granting a bankrupt his discharge (*l*), or approving a composition or scheme of arrangement offered by a debtor, if at the time of appeal his proof has been formally tendered and has not been rejected, even though he had not proved at the date of the order (*m*). But a person who alleges that he is a creditor but has never tendered a proof has no *locus standi* to appeal (*n*).

Appeal against refusal to hear.

So an appeal lies where there has been a wrongful refusal to hear a person to whom notice of an application was given (*o*).

Board of Trade.

The Board of Trade may appeal from an order of discharge, or from the approval of a composition or scheme (*p*), or from an order overruling their objection to the appointment of a trustee (*q*), or their fixing of his remuneration (*r*), and the official receiver may appeal from the refusal of an order of immediate adjudication against the debtor (*s*).

Order for private examination.

A person ordered to be examined before the court at a private sitting can appeal from the order if the examination is likely to cause injustice to him (*t*).

Dismissal of petition.

A petitioning creditor may appeal from the dismissal of his petition, even though, subsequently to the dismissal, a receiving order has been made on the debtor's petition. If in such a case the appeal is successful the receiving order will stand, but as if made on the creditor's petition and as if dated when the creditor should have obtained his receiving order (*u*).

Where no right of appeal.

A bankrupt or accomplice of the bankrupt cannot appeal from an order directing his prosecution under the Debtors Acts (*w*), nor can

(*h*) *Ex parte Ellis, Re Ellis* (1876), 2 Ch. D. 797; and see *Ex parte Learoyd, Re Foulds* (1878), 10 Ch. D. 3; *Ex parte Tucker, Re Tucker* (1879), 12 Ch. D. 308, where an extension of time for appealing was given to a person whose rights were affected by the adjudication.

(*i*) *Ex parte Sadler, Re Whelan* (1878), 39 L. T. 361; *Re Batten, Ex parte Milne* (1889), 22 Q. B. D. 685.

(*k*) *Re Jameson & Sandys, Ex parte Cresswell & Jameson* (1891), 8 Morr. 278.

(*l*) *Ex parte Castle Mail Packets Co., Re Payne* (1886), 18 Q. B. D. 154.

(*m*) *Re Langtry* (1894), 1 Mans. 169.

(*n*) *Ex parte Ditton, Re Woods* (1879), 11 Ch. D. 56.

(*o*) *Re Webb & Sons, Ex parte Webb & Sons* (1887), 4 Morr. 52.

(*p*) Bankruptcy Rules, rr. 202, 237; so may the trustee, if any (*ibid.*). These rules are not *ultra vires* (*Re Stainton, Ex parte Board of Trade* (1887), 19 Q. B. D. 182).

(*q*) *Re Lamb, Ex parte Board of Trade*, [1894] 2 Q. B. 805.

(*r*) *Re Shirley, Ex parte Board of Trade* (1892), 9 Morr. 147.

(*s*) *Ex parte Official Receiver, Re Reed, Bowen & Co.* (1887), 19 Q. B. D. 174.

(*t*) *Re North Australian Territory Co.* (1890), 45 Ch. D. 87, at p. 95.

(*u*) *Re Haynes, Ex parte Kibble* (1890), 7 Morr. 50; *Re Johns, Ex parte Spears* (1893), 10 Morr. 190. Generally when a Court of Appeal makes a receiving order the order will be dated as of the day when it should have been made (*Re Raatz, Ex parte Carlhian* (1897), 4 Mans. 50).

(*w*) *Ex parte Brown, Re Appleby* (1876), 2 Ch. D. 799; *Ex parte Evans, Re Orbell* (1881), 44 L. T. 762.

a first petitioning creditor appeal from a receiving order made on a second petition (*x*), nor a lessor, after the execution of a disclaimer, from the order giving leave to disclaim (*y*).

SUB-SECT. 1. In General.

SUB-SECT. 2.—*Appeals from County Courts.*

Appeals to Divisional Court.

504. An appeal lies in bankruptcy matters (*a*), from a county court having bankruptcy jurisdiction (*b*) to a Divisional Court of the High Court, of which the judge to whom bankruptcy business is assigned for the time being, or the judge who is temporarily acting in his place (*c*), must be a member; but any order or direction incidental to the appeal, not involving its decision, may be given by the judge for the time being exercising bankruptcy jurisdiction; but such order or direction may be discharged or varied by the Divisional Court in Bankruptcy (*d*). The decision of the Divisional Court is final and conclusive, unless that court or the Court of Appeal give special leave to appeal to the Court of Appeal, whose decision in that case is final and conclusive (*e*).

Further appeals in county court cases.

Leave to appeal to the Court of Appeal should be asked for, if at all, at the time the Divisional Court makes its order (*f*), and leave as a rule should be given if the question is one of principle and novel (*g*). The Court of Appeal will give leave to appeal from the Divisional Court in any case in which the Divisional Court has wrongly refused leave to appeal. But in a bankruptcy proceeding in a county court the decision of the Court of Appeal on appeal from the Divisional Court is final, and there is no appeal from that decision to the House of Lords (*h*). In cases of difficulty and importance coming to the Court of Appeal from a county court, the

(*x*) *Ex parte Mason, Re White* (1880), 14 Ch. D. 71.

(*y*) *Ex parte Sadler, Re Hawes* (1881), 19 Ch. D. 122.

(*a*) As to what is a bankruptcy matter, see *Re Owen, Ex parte Peyton* (1885), 2 Morr. 87.

(*b*) A Divisional Court for the hearing of bankruptcy appeals will not entertain an appeal from a county court not having bankruptcy jurisdiction; see *Re Watkins, Ex parte Watkins* (1886), 3 Morr. 146, where the judge had made an order for committal under s. 5 of the Debtors Act, 1869 (32 & 33 Vict. c. 62); see p. 338, *post*, and title COUNTY COURTS.

(*c*) During vacation, or in the absence or illness of the bankruptcy judge, the King's Bench judge in chambers acts in his stead (Order of 25th November, 1891). See *Ex parte Leigh* (1897), 13 T. L. R. 108, where in the absence of the bankruptcy judge on circuit a Divisional Court for a bankruptcy appeal was constituted of the judge in chambers and one of the other High Court judges.

(*d*) Bankruptcy Appeals (County Courts), Act, 1884 (47 Vict. c. 9), s. 2; Bankruptcy Rules, r. 134 A (No. 1); *Re Dunhill, Ex parte Wilson*, [1894] 2 Q. B. 554.

(*e*) Bankruptcy Appeals (County Courts) Act, 1884 (47 Vict. c. 9), s. 2, repealing Bankruptcy Act, 1883 (46 & 47 Vict. c. 52), s. 104 (2) (a). As to the power of the Court of Appeal to re-hear an appeal in bankruptcy from a county court, see *Re Barber* (1886), 17 Q. B. D. 259, 265; *Re Morritt* (1886), 18 Q. B. D. 222, 225.

(*f*) *Re Walker & Son, Ex parte Nicholl & Knight* (1884), 1 Morr. 249; *Re Maud, Ex parte Townend* (1891), 8 Morr. 144.

(*g*) *Ex parte Gilchrist, Re Armstrong* (1886), 17 Q. B. D. 521, 528. See *Ex parte Player, Re Player*, [1885] W. N. 216, where the Court of Appeal in the circumstances gave leave to appeal after the expiration of the time for appealing.

(*h*) Bankruptcy Appeals (County Courts) Act, 1884 (47 Vict. c. 9), s. 2.

SUB-SECT. 2. Appeals from County Courts.

Court of Appeal will sometimes order a case to be re-argued before the full Court of Appeal (*i*).

A county court judge cannot hear an appeal from or review the decision of the registrar (*j*).

The Divisional Court has no power to enforce an order made by it on the registrar of the county court personally (*k*).

SUB-SECT. 3.—*Appeals to the Court of Appeal.*

Court of Appeal.

505. All appeals from judgments or orders of the High Court in bankruptcy matters, whether given or made in court or in chambers, lie to the Court of Appeal (*l*).

SUB-SECT. 4.—*Appeals to the House of Lords.*

House of Lords.

506. In a bankruptcy proceeding in the High Court an appeal lies from a decision of the Court of Appeal, with the leave of that court, but not otherwise, to the House of Lords (*m*). Leave to appeal will not be given except upon some question of law or equity of sufficient difficulty or importance to require the decision of the highest tribunal (*n*).

SUB-SECT. 5.—*Procedure on Appeals.*

Rules governing appeals.

507. No appeal will be entertained except it be made in conformity with the rules in force relating thereto (*o*). These rules are, in the first place, the Bankruptcy Rules (*p*), and, subject to these, the Rules of the Supreme Court for regulating appeals to the Court of Appeal, the words "Court of Appeal" in these rules, and in the Bankruptcy Rules, including, for the purpose of bankruptcy appeals, any court to which appeals lie from a court in bankruptcy (*q*).

(*i*) *Ex parte Stanford, Re Barber* (1886), 17 Q. B. D. 259, 268; *Ex parte Official Receiver, Re Morritt* (1887), 18 Q. B. D. 222.

(*j*) *Re Maugham, Ex parte Maugham* (1888), 21 Q. B. D. 21.

(*k*) *Ex parte Registrar of Croydon County Court, Re Wise* (1886), 17 Q. B. D. 389.

(*l*) Bankruptcy Act, 1883 (46 & 47 Vict. c. 52), s. 104 (2) (b); *Ex parte Oastler, Re Friedlaender* (1884), 51 L. T. 309; *Re Moore* (1885), 2 Morr. 78; *Ex parte Dawes, Re Moon* (1886), 17 Q. B. D. 275 (appeal from order of judge on special case stated). See also *Re Webster, Ex parte Foster & Co.* (1886), 3 Mor. 132.

(*m*) Bankruptcy Act, 1883 (46 & 47 Vict. c. 52), s. 104 (2) (c); see *Lane* v. *Esdaile*, [1891] A. C. 210.

(*n*) *Re Calthrop* (1868), 3 Ch. App. 252, 257; *Ex parte Attwater, Re Turner* (1877), 5 Ch. D. 27; *Ex parte Hayman, Re Pulsford* (1878), 8 Ch. D. 11 (where the question was one of fact); *Ex parte Jackson, Re Bowes* (1880), 14 Ch. D. 725; *Ex parte Pillers, Re Curtoys* (1881), 17 Ch. D. 653; *Ex parte East and West India Dock Co., Re Clarke* (1881), 17 Ch. D. 759; *Ex parte Allen, Re Fussell* (1882), 20 Ch. D. 341; *Ex parte Edwards, Re Chapman* (1884), 13 Q. B. D. 747, 752; *Ex parte Edwards, Re Tollemache* (1884), 14 Q. B. D. 415; *Ex parte Board of Trade, Re Parker* (1885), 15 Q. B. D. 196, 213; *Re Brown & Wingrove, Ex parte Ador*, [1891] 2 Q. B. 574, 582. There may be cases of novelty in which the bankrupt will be allowed to appeal *in formâ pauperis*, without the joinder of the trustee in bankruptcy (*Crossley* v. *Antivibration Incandescent Lighting Co., Ltd.*, [1906] W. N. 76).

(*o*) Bankruptcy Act, 1883 (46 & 47 Vict. c. 52), s. 104 (2) (d).

(*p*) Bankruptcy Rules, rr. 129—133.

(*q*) *Ibid.*, rr. 134, 3 (a). Thus a Divisional Court when hearing an appeal in bankruptcy from a county court is a Court of Appeal for the purposes of R. S. C., Ord. 58, so far as the rules therein are applicable.

SUB-SECT. 5. Procedure on Appeals.

When leave necessary.

508. By the Bankruptcy Rules relating to appeals no appeal can be brought without the leave of the court or of the Court of Appeal (*r*) from any order made by consent, or as to costs only, or from any order relating to property when it is apparent from the proceedings that the money or money's worth involved does not exceed £50; and no appeal lies in respect of the omission by the court to exercise a discretionary power unless on application made the court shall have refused to exercise the power, in which case an appeal will lie (*s*).

Time for appeal.

509. Subject to the power of the Court of Appeal (*r*) to extend the time where there are special circumstances (*a*), an appeal to the

(*r*) As to meaning of "Court of Appeal," see note (*q*), p. 304, *ante*.

(*s*) Bankruptcy Rules, r. 129 (1905), replacing the former r. 129 and rendering *Re Everson, Ex parte Official Receiver*, [1904] 2 K. B. 619, no longer law. Under the old rule, according to that case, the leave of the primary court was essential. The rule as to the £50 limit has been held to be not *ultra vires* (*Re Hann, Ex parte Foreman* (1886), 4 Morr. 16). As to appeals from orders as to costs only, see title PRACTICE AND PROCEDURE; Judicature Act, 1873 (36 & 37 Vict. c. 66), s. 49; *Ex parte Waddell, Re Lutscher* (1877), 6 Ch. D. 328; *Ex parte Wainwright, Re Wainwright* (1881), 19 Ch. D. 140; *Ex parte Marsh, Re Marsh* (1885), 15 Q. B. D. 340, with which compare *Re Allingham* (1886), 32 Ch. D. 36; *Re Bradford, Thursby and Farish* (1883), 15 Q. B. D. 635; *Re Sartoris, Ex parte Ross* (1891), 8 Morr. 25; *Re Coles, Ex parte Board of Trade* (1895), 2 Mans. 217; *Re Beeston, Ex parte Board of Trade* (1899), 6 Mans. 27; *Re Raynes Park Golf Club, Ltd., Ex parte Official Receiver*, [1899] 1 Q. B. 961; *Bew* v. *Bew*, [1899] 2 Ch. 467.

As to the limit of £50, an appeal was entertained where the court had declined jurisdiction, though the property was below that limit (*Re Galey, Ex parte Cundy* (1890), 7 Morr. 253).

As to refusal to exercise discretion, see *Re Stephens, Ex parte the Trustee* (1885), 2 Morr. 20; *Ex parte Soanes, Re Walker* (1884), 13 Q. B. D. 484.

(*a*) What are "special circumstances" is so much a matter for the court that it is impossible to lay down any positive rule with regard to them. A mistake of a solicitor as to the practice of the court is not a special circumstance (*Re Faulconer, Ex parte Cochrane* (1889), 6 Morr. 206; *Re Vitoria, Ex parte Spanish Corporation*, [1894] 1 Q. B. 259; *Re Helsby, Ex parte the Trustee*, [1894] 1 Q. B. 742), nor is a similar mistake by counsel (*Re Coles and Ravenshear*, [1907] 1 K. B. 1); except, perhaps, where the order appealed from is of an interlocutory nature, and no injustice will be caused by the extension of time (*Re Tippett, Ex parte Tippett* (1885), 2 Morr. 229). See also *Ex parte Arden, Re Arden* (1884), 14 Q. B. D. 121, decided when the Bankruptcy Act, 1883 (46 & 47 Vict. c. 52), had not been long in operation.

But an extension of time was refused where, though the offices of the court were closed for some days, an appeal might have been served on the respondent within twenty-one days (*Ex parte Saffery, Re Lambert* (1877), 5 Ch. D. 365). See also *Ex parte Viney, Re Gilbert* (1877), 4 Ch. D. 794, as to the importance of service on the respondent within the prescribed time. In *Re Dallmeyer, Ex parte Dallmeyer* (1906), 22 T. L. R. 445, it was held that the entry of the appeal, as well as the service of it, must be within twenty-one days. Compare, however, *Christopher* v. *Croll* (1885), 16 Q. B. D. 66.

Where on appeal from a refusal to annul an adjudication the trustee had not been served with notice, the appeal was dismissed (*Ex parte Ward, Re Ward* (1880), 15 Ch. D. 292). And so was an appeal against a receiving order, notice of which had not been served on the official receiver (*Re Webber, Ex parte Webber* (1889), 24 Q. B. D. 313).

With regard to third parties affected by an order, it would seem that though *primâ facie* the limit of twenty-one days binds them, yet if they take proceedings immediately after becoming acquainted with the making of the order, they will readily obtain an extension of time for appealing. See and compare *Ex parte*

SUB-SECT. 5. **Procedure on Appeals.**

Court of Appeal from an order of the court cannot be brought after the expiration of twenty-one days, which period is calculated from the time at which the order is signed, entered or otherwise perfected, or, in the case of the refusal of an application, from the date of the refusal (*b*). An order for the payment of money or costs is perfected when it has been signed and sealed by the registrar, though not filed (*c*).

Computation of time.

In the calculation of the twenty-one days they are to be taken as exclusive of the day of the date when the order was perfected, or the application refused, as the case may be, and as commencing at the beginning of the next day, and the appeal must be brought at latest on the last of the twenty-one days, unless that day happens to be a Sunday, Christmas Day, Good Friday, or Monday or Tuesday in Easter week, or a day appointed for a public fast, humiliation, or thanksgiving, or a day on which the court does not sit (*d*), in which case it may be brought on the next day, which shall not be one of the days above mentioned (*e*).

Notice of motion.

510. An appeal is brought by the appellant giving a notice of motion to the appellate court, which notice of motion must be served on the respondent and entered for hearing with the officer of the appellate court (*f*). On an appeal from a county court the appellant must state in his notice of motion the grounds of his appeal, but an omission to do so will not involve the dismissal of the appeal (*g*). On an appeal from the High Court the grounds of appeal need not be stated.

Copy of notice.

A party entering an appeal must, except where the appeal is from a decision of the High Court, forthwith (*h*) send a copy of the notice of appeal to the registrar of the court below, who is to mark thereon the date when received and forthwith file it (*i*), and upon

Learoyd, Re Foulds (1878), 10 Ch. D. 3; *Ex parte Tucker, Re Tucker* (1879), 12 Ch. D. 308. Compare an earlier decision of BACON, C.J., *Re Johnson, Ex parte Wigg* (1879), 12 Ch. D. 905.

(*b*) Bankruptcy Rules, r. 130. The notice must reach the respondent within that time (*Re Faulconer, Ex parte Cochrane* (1889), 6 Morr. 206). See *Ex parte Arden, Re Arden* (1884), 14 Q. B. D. 121. As to appeals from the official receiver or Board of Trade, see note (*n*), p. 317, *post*.

(*c*) *Re Helsby, Ex parte the Trustee*, [1894] 1 Q. B. 742, holding that Bankruptcy Rules, r. 109, by which "every order for payment of money or costs, or either of them, shall be sealed, and be signed by a registrar, and shall be forthwith filed with the proceedings," is to be read disjunctively.

(*d*) That is, for this purpose, when the offices of the court are closed (Bankruptcy Rules, r. 4 (3)).

(*e*) Bankruptcy Act, 1883 (46 & 47 Vict. c. 52), s. 141 (1).

(*f*) R. S. C., Ord. 58, r. 2.

(*g*) High Court Regulations, 1890, 7 Morr. 64; *Re Smith, Ex parte Earl of Denbigh* (1892), 9 Morr. 316.

(*h*) Omission to do this is not a mere formal irregularity (*Re Vitoria, Ex parte Spanish Corporation*, [1894] 1 Q. B. 259). The copy of the notice should be sent within the twenty-one days, though there may be extreme cases in which it may be sent as soon as possible thereafter. See *Re Sillence, Ex parte Sillence* (1877), 7 Ch. D. 238; *Ex parte Donnithorne, Re Green* (1879), 40 L. T. 660; *Ex parte Lamb, Re Southam* (1881), 19 Ch. D. 169; *Ex parte Lyon, Re Lyon* (1882), 45 L. T. 768; *Ex parte Williams, Re Jones* (1882), 46 L. T. 244 (under Bankruptcy Act, 1869 (32 & 33 Vict. c. 71)).

(*i*) Bankruptcy Rules, r. 132.

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the application of the senior registrar of the High Court transmit to him the file of proceedings (*k*).

Length of notice.

Fourteen days' notice of appeal is necessary when an appeal is from a judgment or final order, and four days' notice in the case of an interlocutory order (*l*).

Service.

Service of the notice of appeal must be made on all parties directly affected by the appeal (*m*), but the mere service of the notice does not entitle a person to appear and ask for costs (*n*).

Preliminary objection.

Notice of a preliminary objection (*o*) should as a matter of professional courtesy be given to an appellant, but omission to give such notice is not a sufficient ground for depriving a successful respondent of his costs (*p*).

Security for costs of appeal.

511. At or before the time when a party (*q*) enters an appeal he must lodge £20 in the High Court to satisfy so far as it may go any costs which he may be ordered to pay, but the Court of Appeal may in any special case increase or diminish this amount or dispense with it altogether (*r*). A debtor appealing against a receiving order will not be ordered to increase the deposit merely on the ground that the out-of-pocket costs of the respondent will largely exceed that sum (*s*). But an appellant who had been engaged in protracted and uniformly unsuccessful litigation with the respondents over the subject-matter of the appeal was ordered to deposit a further sum (*t*). The deposit cannot be applied to other

(*k*) Bankruptcy Rules, r. 133.

(*l*) R. S. C., Ord. 58, r. 3. It is difficult to say what is an interlocutory order in bankruptcy. An order refusing to set aside a bankruptcy notice is not (*Re Phillips, Ex parte Phillips* (1888), 5 Morr. 187); nor is an order made on an application for discharge (*Re Landau, Ex parte Brown & Wingrove* (1887), 4 Morr. 253). See further, *Ex parte Tippett, Re Tippett* (1885), 2 Morr. 229; *Re Miles, Ex parte Turnbull* (1889), 6 Morr. 213. See as to substituted service of notice of appeal *Ex parte Warburg, Re Whalley* (1883), 24 Ch. D. 364.

(*m*) R. S. C., Ord. 58, r. 2; *Re A Debtor*, [1901] 2 K. B. 354 (petitioning creditor must be served where official receiver appeals against stay under receiving order). See also *Ex parte Ward, Re Ward* (1880), 15 Ch. D. 292; *Re Webber, Ex parte Webber* (1889), 24 Q. B. D. 313.

(*n*) *Re Salaman, Ex parte Salaman* (1885), 2 Morr. 61, 70 (creditors); *Ex parte Arden, Re Arden* (1884), 14 Q. B. D. 121 (trustee); *Ex parte Dixon, Re Dixon* (1884), 13 Q. B. D. 118; *Ex parte Reed & Bowen, Re Reed & Bowen* (1886), 17 Q. B. D. 244 (official receiver).

(*o*) *E.g.*, that any of the grounds of appeal were not taken in the court below. See High Court Regulations, 1890, 7 Morr. 64.

(*p*) *Ex parte Shead, Re Mundy* (1885), 15 Q. B. D. 338, not following *Re Speight, Ex parte Brooks* (1884), 13 Q. B. D. 42; *Ex parte Blease, Re Blinkhorn* (1884), 14 Q. B. D. 123. Compare *Re Phillips, Ex parte the Trustee* (1895), 2 Mans. 206, where costs were refused; in that case leave had been given to enter the appeal.

(*q*) The Board of Trade, being a Government department, may appeal without lodging a deposit (*Re Mutton, Ex parte Board of Trade* (1887), 4 Morr. 115).

(*r*) Bankruptcy Rules, r. 131. Distinct appeals cannot be combined so as to avoid the necessity of separate deposits (*Re Smith & Sons, Ex parte Smith* (1890), 7 Morr. 30). The inability of the appellant to find the £20 is not a sufficient reason for dispensing with it (*Re Robertson* (1885), 2 Morr. 117; *Re Grepe, Ex parte Grepe* (1887), 4 Morr. 128). See, however, *Re Jones, Ex parte Lloyd* (1891), 8 Morr. 192.

(*s*) *Re Phillips, Ex parte The Treboeth Brick Co.*, [1896] 2 Q. B. 122.

(*t*) *Re McHenry* (1886), 17 Q. B. D. 351. Compare *Ex parte Lovering, Re*

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costs than those of the appeal (*a*) or incidental thereto (*b*). It may be dispensed with altogether if there is no respondent, as on an appeal from the refusal of an order to examine a witness (*c*).

Evidence.

512. The onus lies on the appellant to bring before the Appeal Court evidence of the proceedings in the court below (*d*). A judge or registrar ought to take a note of any oral evidence given before him, but if he has failed to do so an affidavit as to what took place before the judge may be tendered (*e*), or a shorthand writer's note may in a proper case be referred to (*f*). As a rule, an appellant cannot raise a new point which the respondent might have met by evidence in the court below (*g*), nor a case inconsistent with the case put forward in that court (*h*).

Costs.

513. If an appellant wishes to withdraw his appeal it will be dismissed with costs (*i*), and so will it be if he does not appear (*k*).

A trustee who unsuccessfully appeals against an order of the court may be ordered personally to pay the costs, and so in some cases will a trustee who is respondent to a successful appeal if he initiated the proceedings (*l*). A trustee who is ordered to pay the costs of an appeal will be entitled to be indemnified out of the estate, unless deprived of the indemnity by order of the Court of Appeal (*m*).

SUB-SECT. 6.—*Rehearing.*

Court's power to rehear.

514. It is a necessary incident of bankruptcy jurisdiction that a court which exercises it should have power to rehear a case which it has decided and to review and vary its orders. In this respect the court exercising bankruptcy jurisdiction has larger powers than it has in the exercise of its ordinary jurisdiction, the general principle

Thorpe (1873), L. R. 15 Eq. 291, a decision under the Bankruptcy Act, 1869 (32 & 33 Vict. c. 71), which does not appear to be applicable now. See *Ex parte Isaacs, Re Baum* (1878), 9 Ch. D. 271.

(*a*) *Re Scott and Mitchell, Ex parte Scott* (1890), 7 Morr. 178.

(*b*) *Re Child, Ex parte The Debtor* (1901), 84 L. T. 326.

(*c*) *Re Garrard* (1905), 92 L. T. 779. The appellant there was directed to serve the official receiver and the registrar with notice of the appeal. As to this, compare *Ex parte Izard, Re Moir* (1882), 20 Ch. D. 703. As to costs of a country solicitor attending an appeal, compare *Re Foster, Ex parte Dickens* (1878), 8 Ch. D. 598; *Re Dixon*, [1898] 2 Ch. 443, and cases there cited.

(*d*) *Ex parte Firth, Re Cowburn* (1882), 19 Ch. D. 419.

(*e*) *Re Sharp, Ex parte Sharp* (1893), 10 Morr. 114.

(*f*) *Re Sprange, Ex parte Official Receiver* (1898), 4 Mans. 335, where the note was used to supplement the judge's note. A party who wishes for a copy of the judge's note should apply to the county court judge himself (*Re Lock, Ex parte Poppleton* (No. 1) (1891), 8 Morr. 44).

(*g*) *Ex parte Firth, Re Cowburn, supra.*

(*h*) *Ex parte Reddish, Re Walton* (1877), 5 Ch. D. 882. See further, R. S. C., Ord. 58, r. 4, and cases decided thereunder. Where an appellant succeeds only upon a ground not raised in the court below, he must pay the costs of the original hearing (*Ex parte Harris, Re James* (1874), 19 Eq. 253; and see *Re O'Shea*, [1895] 1 Ch. 325, 332).

(*i*) *Ex parte Lows, Re Lows* (1877), 7 Ch. D. 160.

(*k*) *Re Downing, Ex parte Mardon* (1891), 8 Morr. 302.

(*l*) *Re Mackenzie, Ex parte Sheriff of Hertfordshire*, [1899] 2 Q. B. 566; *Re Galey, Ex parte Cundy* (1890), 7 Morr. 253, at p. 256; *Ex parte Gordon, Re Bryant* (1889), 6 Morr. 262; *Ex parte Stapleton, Re Nathan* (1879), 10 Ch. D. 586.

(*m*) *Re Malden, Gibson & Co., Ex parte James* (1886), 3 Morr. 185.

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being that a final order of a court made in a litigation cannot be altered by the court which made it (*n*).

It is provided that every court with bankruptcy jurisdiction has power to review, rescind or vary any order made by it whilst acting under such jurisdiction (*o*). The power to review an order can only be exercised by the court which made it (*p*). And so where the order of the judge has been wrongly drawn up by the registrar and filed, the registrar cannot afterwards alter it (*q*).

Who may apply for rehearing.

It would seem that an application for a rehearing can only be made by the person against whom the original order was made (*r*), and it may be made though, by accident or otherwise, he was not present or represented to resist that order (*s*).

The fact that an appeal is pending from the original order will not necessarily be fatal to a rehearing (*t*), and even where the appeal has been disposed of there may be a rehearing on a point not dealt with on the appeal (*u*).

Time for application.

515. There is no time limited for making an application to rehear, but as a general rule it should be made within the time fixed for an appeal, though it may on special grounds be made at a later period (*w*). It should not be made if the real object is to extend the time for appealing (*a*).

Requisites for application.

516. An application for a rehearing should not, as a general rule, be made *ex parte* (*b*), nor, except in cases of clear mistake, founded on the same materials as were previously before the court (*c*). But an application to review an order relating to the discharge of the

(*n*) See title JUDGMENTS AND ORDERS.

(*o*) Bankruptcy Act, 1883 (46 & 47 Vict. c. 52), s. 104 (1).

(*p*) *Re Maugham, Ex parte Maugham* (1888), 21 Q. B. D. 21 (county court judge has no power to review decision of registrar); *Re Clifton, Ex parte Clifton* (1890), 7 Morr. 59; *Re Perkins, Ex parte Perkins* (1890), 7 Morr. 78. See also *Re Shurley, Ex parte Shurley* (1888), 5 Morr. 158. See, as to rescinding receiving orders, *Ex parte Wemyss, Re Wemyss* (1884), 13 Q. B. D. 244; *Ex parte Leslie, Re Leslie* (1887), 18 Q. B. D. 619; *Re Izod, Ex parte Official Receiver*, [1898] 1 Q. B. 241; *Re Newman, Ex parte Official Receiver*, [1899] 2 Q. B. 587.

(*q*) *Re Beard, Ex parte Lewis* (1893), 10 Mor. 178.

(*r*) See *Re John Roberts & Co., Ex parte Bonzoline Manufacturing Co.*, [1904] 2 K. B. 290, *per* VAUGHAN WILLIAMS, L.J., at p. 302.

(*s*) *Re Blennerhasset, Ex parte Blennerhasset* (1890), 7 Morr. 283; terms may be imposed (*ibid.*).

(*t*) *Ex parte Keighley, Re Wike* (1874), 9 Ch. App. 667.

(*u*) *Ex parte Mackay, Re Jeavons* (1873), 9 Ch. App. 127. Generally, however, the power to rehear is one to be exercised with great caution (*Ex parte May, Re May* (1884), 12 Q. B. D. 497; *Ex parte Brown, Re Jeavons* (1874), 9 Ch. App. 304). The order made on the rehearing may be appealed from (*Re Bishop, Ex parte Claxton* (1891), 8 Morr. 221), even though it does not vary the original order (*Re Ashworth & Outram* (1893), 10 Morr. 175).

(*w*) *Ex parte Brown, Re Jeavons, supra; Ex parte Geisel, Re Stanger* (1882), 22 Ch. D. 436; *Ex parte Ritso, Re Ritso* (1882), 22 Ch. D. 529; and see *Re Bright, Ex parte Wingfield and Blew*, [1903] 1 K. B. 735 (reported on another point), where an order for a rehearing was made after the lapse of several months, see *ibid.*, p. 736.

(*a*) *Re Lister, Ex parte Simmons* (1876), 2 Ch. D. 749; *Ex parte May, Re May, supra*, where the court had jurisdiction to make the original order, but made it on a wrong view of the law.

(*b*) *Ex parte Ritso, Re Ritso* (1883), 22 Ch. D. 529.

(*c*) *Re Ayshford, Ex parte Lovering* (1887), 4 Morr. 164.

SUB-SECT. 6. Rehearing.

bankrupt may, it seems, be made either on fresh facts or on those which were or might have been before the court when the original order was made (*d*).

The court may revoke an order of discharge, granted on the terms that the bankrupt consent to judgment for a certain sum directed by the order to be paid by him by certain instalments, where after consent to judgment there has been a failure to pay the instalments (*e*).

Where a person asks for a rehearing of a former order, he should make out a *primâ facie* case, which the other side need not answer till the court has decided that there are *primâ facie* grounds for granting a rehearing. Where the court so decides, a party dissatisfied who wishes to appeal against the decision should do so at once (*f*).

Rehearing in Court of Appeal.

517. The Court of Appeal may, it appears, rehear a bankruptcy appeal which has been before it, but where an appeal from its judgment to the House of Lords is pending, an application for a rehearing for the purpose of inserting in the judgment fresh evidence will not be entertained, though the court may amend its judgment by inserting in it evidence which was before the court, but has been by a slip omitted from the judgment (*g*).

SECT. 17.—*Miscellaneous Practice and Procedure.*

SUB-SECT. 1.—*Court and Chambers.*

Matters to be heard in open court.

518. The judge of the High Court exercising bankruptcy jurisdiction may, subject to certain restrictions, exercise such jurisdiction in chambers (*h*). The matters which must be heard in open court are public examinations, applications to approve a composition or scheme, or for orders of discharge, or for certificates of removal of disqualifications, appeals from the Board of Trade, applications to set aside or avoid any settlement, conveyance, transfer, security, or payment, or to declare for or against the title of the trustee to any property adversely claimed, applications for committal for contempt, appeals against the rejection of proofs, or applications to expunge or reduce a proof where the amount in dispute exceeds £200, and applications for the trial of issues of fact with a jury, and the trial of such issues. Other matters may be heard in chambers (*i*).

Powers of registrars.

519. Bankruptcy registrars, both in the High Court and in county courts with bankruptcy jurisdiction, may, subject to rules limiting their powers, hear bankruptcy petitions and make receiving orders and adjudication orders, hold public examinations, grant orders of

(*d*) Compare *Re Lloyd, Ex parte Lloyd* (1889), 6 Morr. 297; *Re Tobias, Ex parte Tobias* (1891), 8 Morr. 30.

(*e*) *Re Summers, Ex parte Official Receiver*, [1907] 2 K. B. 166.

(*f*) *Re Lloyd, Ex parte Lloyd, supra.*

(*g*) *Ex parte Banco de Portugal, Re Hooper* (1880), 14 Ch. D. 1.

(*h*) Bankruptcy Act, 1883 (46 & 47 Vict. c. 52), s. 98.

(*i*) Bankruptcy Rules, r. 6; Bankruptcy Act, 1883 (46 & 47 Vict. c. 52), s. 17 (1); Bankruptcy Act, 1890 (53 & 54 Vict. c. 71), s. 8 (1). See also orders of CAVE, J., of January 1, 1884, and March 25, 1885.

discharge in unopposed cases, and in like cases approve compositions or schemes of arrangement (*k*), make interim orders in cases of urgency, make orders and exercise jurisdiction which by the rules may be made or exercised in chambers, hear and determine any unopposed or *ex parte* application, and summon and examine any person for the purpose of discovering the debtor's property (*l*).

County courts.

520. County courts with bankruptcy jurisdiction must for such jurisdiction, subject to any orders of the Lord Chancellor, sit in the town where the general business of the court is conducted (*m*).

SUB-SECT. 2.—*Proceedings in Court generally.*

Formal parts of documents.

521. Every proceeding in court under the Bankruptcy Acts must be dated and entitled "In Bankruptcy," with the name of the court and the matter to which it relates and the number given to the matter by the registrar. All applications are to be intituled *ex parte* the applicant, and forms Nos. 1 and 2 should be used, with variations or additions if requisite (*n*).

Records of the court.

All proceedings of the court remain of record therein, and though they may not be removed except for the use of the officers of the court or by special direction of the judge or registrar, they may be inspected by the trustee, the debtor and any creditor who has proved, or by any person on behalf of any of them (*o*).

(*k*) As to unopposed applications for discharge, see Bankruptcy Rules, r. 236. The High Court registrars may deal with opposed applications for discharge, grant certificates of removal of disqualifications, and hear opposed applications for approval of compositions or schemes (Bankruptcy Act, 1883 (46 & 47 Vict. c. 52), s. 99 (3)). The Lord Chancellor may direct that any specified registrar of a county court shall have the powers of a High Court registrar (*ibid.*, s. 99 (5)). No registrar can commit for contempt (*ibid.*, s. 99 (4)).

(*l*) Bankruptcy Act, 1883 (46 & 47 Vict. c. 52), s. 99. But, by certain regulations issued by the High Court judge, some of these matters cannot be dealt with by a High Court registrar, namely, applications by creditor for leave to commence action, objections to trustee, special cases, transfer of actions to High Court judge (as to which, see *Re White & Co., Ex parte Official Receiver* (1884), 1 Morr. 77; *Re Ross, Ex parte the Trustee* (1888), 5 Morr. 281; *Re Champagné, Ex parte Kemp* (1893), 10 Morr. 285; *Re Somes, Ex parte Deller* (1895), 2 Mans. 396); applications by the Board of Trade under s. 102 (5) of Bankruptcy Act, 1883 (46 & 47 Vict. c. 52); applications for leave to trustee to commence action under s. 113 of that Act; or for the approval or amendment of issues of fact to be tried by a jury under Bankruptcy Rules, r. 94; or for directions as to trial of issues under r. 96, or as to trial of actions brought by a trustee under r. 101. See Regulations for High Court business, dated January 1, 1884, as amended March 25, 1885. By these regulations also a registrar may in certain cases adjourn matters before him, to be heard by the judge, and so may the judge (Bankruptcy Rules, r. 8; *Re Hooley, Ex parte Hooley*, No. 2 (1898), 6 Mans. 176); and, generally, matters may be adjourned from chambers to court, or *vice versâ* (Bankruptcy Rules, r. 9).

(*m*) Bankruptcy Rules, r. 98. The judge may fix the days for exercising such jurisdiction (*ibid.*, r. 99).

(*n*) *Ibid.*, r. 10. The proceedings must be written or printed on sheets of paper sixteen inches in length and ten inches in breadth or thereabouts; but an objection will not be allowed to any proof, affidavit or proxy on account of paper of another size being used (*ibid.*, r. 11). All notices must, save where it is otherwise provided, be in writing, and all summonses, petitions, notices, orders, warrants and other process issued by the court must be sealed (*ibid.*, rr. 13, 14).

(*o*) *Ibid.*, r. 12. Any of such persons may personally or by his solicitor obtain

SUB-SECT. 2. Proceedings in Court generally.

The file.

The file of proceedings, if required by the Board of Trade or the official receiver for the fulfilment of their duties, must be transmitted to them (*p*). The senior registrar of the High Court and the registrar of a county court must file a copy of each issue of the *London Gazette*, and when it contains an advertisement of any matter in court, file a memorandum thereof with the proceedings (*q*).

SUB-SECT. 3.—*Transfer of Proceedings.*

Powers of court as to transfer.

522. Though the court in which bankruptcy proceedings should be commenced is prescribed (*r*), yet every court having original jurisdiction in bankruptcy has jurisdiction throughout England (*s*). Proceedings may at any stage be transferred by the prescribed authority in the prescribed manner from one court to another, or they may be retained in the court in which they were commenced, though that may not be the court in which they should have been commenced (*t*). The power of transfer is prescribed and limited as follows: the judge of the High Court may at any time, for good cause shown, order proceedings to be transferred from a county court to the High Court, or from the High Court to a county court, and a county court judge, for like cause, may order proceedings commenced or pending in his court to be transferred to any other county court; but a county court cannot transfer proceedings to or from the High Court (*a*).

Notices requisite.

523. Notice of an application to transfer proceedings from the High Court to a county court, or *vice versâ*, should be served on the debtor, and on the official receiver, and upon the trustee if any has been appointed (*b*).

Where a court makes an order of transfer, the registrar sends a sealed copy of the order to the court affected by it, and the file of proceedings is transmitted to the registrar of the court to which the

office copies of petitions, proceedings, affidavits, books, papers and writings from the senior registrar in the High Court and from the registrar in a county court (*ibid.*, r. 16).

(*p*) Bankruptcy Rules, r. 17 A.

(*q*) *Ibid.*, r. 17. If a local paper contains an advertisement, the person inserting it must leave a copy with the registrar who is to file it, and a memorandum referring to it. Any memorandum filed is *primâ facie* evidence that the advertisement was duly inserted in the *Gazette* or local paper (*ibid.*).

(*r*) Bankruptcy Act, 1883 (46 & 47 Vict. c. 52), s. 95.

(*s*) *Ibid.*, s. 97; *i.e.*, subject to s. 95, *supra*.

(*t*) *Ibid.*, s. 97; Bankruptcy Rules, r. 25. If a petition has been inadvertently presented in the wrong court a receiving order may be made, and the matter may afterwards be transferred to the right court; but a petition wilfully presented in the wrong court may be dismissed (*Ex parte May, Re Brightmore* (1884), 14 Q. B. D. 37; *Re French, Ex parte French* (1889), 24 Q. B. D. 63). See pp. 47, 48, *ante*.

(*a*) Bankruptcy Rules, rr. 18, 19. An appeal may be brought from a refusal to transfer where the judge has refused to exercise his discretionary powers (*Ex parte Soanes, Re Walker* (1884), 13 Q. B. D. 484). See *Re Linton* (1892), 8 T. L. R. 219, and, on appeal, 377. An application to transfer from the High Court to the county court should be made in chambers (*Re Williams, Ex parte Chief Official Receiver* (1888), 5 Morr. 103).

(*b*) *Re Yapp, Ex parte the Trustee* (1886), 55 L. T. 820; *Re Jack* (1887), 18 Q. B. D. 682.

matter is transferred; and he on receipt of the file gives notice to the official receiver of the court (who thereupon becomes official receiver of the debtor's estate), and to the Board of Trade (*c*).

SUB-SECT. 3. Transfer of Proceedings.

Special case.

524. If any question of law arises in a bankruptcy proceeding in a county court, and either all the parties, or one of them and the judge, desire its determination in the first instance by the High Court (*d*), the judge states the facts in the form of a special case, and thereupon the special case and the proceedings, or such of them as may be required, are transmitted to the High Court for its determination (*e*).

SUB-SECT. 4.—*Motions and Practice thereon.*

Affidavit evidence.

525. Every application to the court, unless it is otherwise directed by the rules or by special order (*f*), is made by motion supported by affidavit (*g*).

When notice of motion necessary.

Where any party other than the applicant is affected by the motion, no order will be made unless such party consents, or

(*c*) Bankruptcy Rules, rr. 20, 21, 23, 24. Rule 22 prescribes form of transfer; see *ibid.*, Appendix, Forms, No. 22. Provision is also made for a transfer of pending business, where an order is made excluding a county court from bankruptcy jurisdiction, or attaching its district or part of it to the High Court or to another county court, or detaching its district or part of it from the jurisdiction of the High Court (*ibid.*, r. 26).

(*d*) *I.e.*, the judge of the High Court (Order, January 1, 1884).

(*e*) Bankruptcy Act, 1883 (46 & 47 Vict. c. 52), s. 97 (3). An appeal to the Court of Appeal will lie from the decision of the High Court (*Ex parte Dawes, Re Moon* (1886), 17 Q. B. D. 275). Special cases were stated in *Re Ludmore* (1884), 13 Q. B. D. 415; *Re Walker* (1886), 3 Morr. 69; *Re Britton* (1889), 6 Morr. 130; *Re Mills, Bawtree & Co., Ex parte Stannard* (1893), 10 Morr. 193; *Re Wilson, Ex parte Lord Hastings* (1893), 10 Morr. 219, where further evidence was heard by the High Court judge; *Re A. & F. Abbott, Ex parte Official Receiver* (1893), 10 Morr. 306.

(*f*) *E.g.*, no affidavit is required where the trustee, official receiver or Board of Trade applies for an examination of witnesses under s. 27 of Bankruptcy Act, 1883 (46 & 47 Vict. c. 52) (Bankruptcy Rules, r. 78); nor, again, where the official receiver applies to the court for directions, or for an adjudication, or for leave to disclaim a lease, or for an extension of time therefor, or for an order to prosecute a bankrupt, or to commit him (*ibid.*, r. 333). So, again, issues of fact are in some cases tried before a jury, or the trustee may bring an action at law (*ibid.*, rr. 94—97, 101).

(*g*) Bankruptcy Rules, r. 27. The court may, however, take evidence *vivâ voce*, or by interrogatories, or by affidavit, or by commission abroad (Bankruptcy Act, 1883 (46 & 47 Vict. c. 52), s. 105 (5)). And in the High Court the parties may agree beforehand to have the evidence given *vivâ voce*, and notify the clerk of the court, after which if necessary an application may be made to fix a day for hearing (*Re Underhill* (1886), 18 Q. B. D. 115). As a rule, where one party desires that the evidence should be taken *vivâ voce*, he should give written notice to the other side, and if no objection is raised within a week, the evidence will be so taken, but if an objection is raised, an application to the court must be made at the peril of the party objecting (Practice Note (1898), 6 Mans. 287). This modifies the rule laid down in *Ex parte Kearsley, Re Genese* (1886), 17 Q. B. D. 1; *Re Hagan & Co., Ex parte Adamson & Ronaldson* (1886), 3 Morr. 117. This practice does not apply to county courts, where the judge may at the hearing allow *vivâ voce* evidence, though he may in his discretion refuse, if a party is taken by surprise (*Re Wilson, Ex parte Watkinson* (1887), 4 Morr. 238).

Rule 27, *supra*, would appear to include an application to the court by a sheriff for an interpleader (*Ex parte Streeter, Re Morris* (1881), 19 Ch. D. 216, a case under the Bankruptcy Act, 1869 (32 & 33 Vict. c. 71)).

SUB-SECT. 4. Motions and Practice thereon.

unless it is shown that he has been served with a copy of the notice of motion, and of the affidavits in support of it (*h*); but where delay might cause serious mischief the court may make an *ex parte* order on such terms as to costs and otherwise, and subject to such undertaking as the court may think just, leaving it to a party affected by the order to apply to set it aside (*i*). Generally, however, if the court thinks that some party who has not been served with notice ought to have been served, it may either dismiss the motion or adjourn the hearing so that notice may be given (*k*).

Length of notice.

Unless leave to the contrary is given (and an application for leave to serve short notice must be made *ex parte*), notice of motion must be served on parties affected thereby not less than 8 days before the day named in the notice for hearing (*l*).

Service outside jurisdiction.

As a rule a notice of motion cannot be served on a person outside the jurisdiction if it brings him into the position of a defendant against whom relief is sought (*m*). But service outside the jurisdiction will be allowed where no personal remedy is sought against the person to be served (*n*), or where a party has brought himself within the jurisdiction by proving a debt against the estate (*o*).

Infant respondent.

An infant respondent should be brought before the court by the appointment of a guardian *ad litem* (*p*).

Affidavits in opposition.

If a respondent intends to use affidavits he must deliver copies of them to the applicant not less than two days before the day appointed for the hearing of the motion (*q*).

(*h*) The copy affidavits should be served along with the notice of motion (*Re Wells, Ex parte Collins* (1892), 9 Morr. 191), and the practice is to mention them therein (compare *Re J. Pearce, Ex parte Board of Trade* (1884), 1 Morr. 111).

(*i*) Bankruptcy Rules, r. 28. See *Re Von Weissenfeld, Ex parte Hendry* (1892), 9 Morr. 30, where a party was held to have no *locus standi* to be heard on a motion.

(*k*) Bankruptcy Rules, r. 31. The court has a general power of adjournment (*ibid.*, r. 32). Where the official receiver was served with a notice of motion leave was given to make a trustee subsequently appointed a party (*Re Hallett & Co., Ex parte Blane* (1893), 10 Morr. 250).

(*l*) Bankruptcy Rules, r. 29. See *Re Alderson, Ex parte Kirby* (No. 1) (1891), 8 Morr. 93. The service may be effected by registered letter (see Bankruptcy Act, 1883 (46 & 47 Vict. c. 52), s. 142; Bankruptcy Rules, r. 92; *Re Bates, Ex parte Hobbs* (1891), 8 T. L. R. 44).

If personal service of a notice or order is required it will be effected by delivering to the party to be served a copy of the notice, or a sealed copy of the order, as the case may be (Bankruptcy Rules, r. 33).

A copy of the notice of motion must before the hearing be delivered to the registrar or clerk of the court (*ibid.*, r. 36).

(*m*) *Re Alderson, Ex parte Kirby* (No. 2) (1891), 8 Morr. 95.

(*n*) *Re Rathbone, Ex parte Paterson* (1887), 4 Morr. 270, where notice of the trustee's intention to apply for leave to disclaim a lease was served on parties in Ireland.

(*o*) *Re Calvert, Ex parte Calvert* (No. 2) (1899), 6 Mans. 216 (motion to expunge proof). See also *Re J. & M. Follick* (1907), 124 L. T. Jo. 12. As to service on the debtor when abroad of orders and summonses, see Bankruptcy Rules, r. 195.

(*p*) *Re Lowndes, Ex parte the Trustee* (1886), 3 Morr. 216.

(*q*) Bankruptcy Rules, r. 30.

Every affidavit, whether used in supporting or opposing a motion, must be filed not later than the day before the hearing (*ibid.*, r. 34).

The registrar will indorse on it the date when it was left for filing, and

SUB-SECT. 4. Motions and Practice thereon.

When motion dismissed.

526. A motion will be defeated by the Statutes of Limitation in cases where an action would be so barred (*r*). And it may be dismissed where the applicant has failed to pay the costs ordered to be paid by him in a previous application in the same matter (*s*), or where the matter is in effect *res judicata* (*t*).

Procedure if order obtained.

527. Where an order is obtained on a motion, reasonable notice of an appointment to settle it should be given by the person having the carriage of it (*a*), and it may be enforced as if it were a judgment of the court (*b*).

Issues of fact.

528. If in any proceeding in bankruptcy a question of fact arises, which either of the parties desires to be tried before a jury, or which the court thinks ought to be so tried, the court may direct a trial accordingly (*c*). Thereupon the issues of fact, when approved by the court, will be tried, in a county court, according to the rules as to jury trials in county courts, and in the High Court, as issues of fact are tried in the King's Bench Division (*d*).

Security.

529. Where in bankruptcy a person is required to give security, such security may be (unless where it is otherwise provided), either in the form of a bond with one or more sureties, taken in a penal sum not less than that for which security is to be given, and the probable costs, or by payment of the sum into court, with a signed memorandum approved by the registrar setting forth the conditions on which the money is so deposited (*e*). The security of a guarantee

it must not be delivered out to any person without an order of the court (*ibid.*, r. 35).

A party should give notice of his intention to use a deposition or affidavit already on the file for another purpose, and not serve a copy thereof (*Ex parte Hall, Re Cooper* (1882), 19 Ch. D. 580).

A party against whom an affidavit is used may cross-examine the deponent on it; but otherwise, if it is filed, but not used (*Ex parte Child, Re Ottaway* (1882), 20 Ch. D. 126).

(*r*) *Re Mansel, Ex parte Norton* (1892), 9 Morr. 198. But it is not equivalent to an action within s. 53 of the County Courts Act, 1888 (51 & 52 Vict. c. 43), which requires one month's notice to be given of an intended action in respect of anything done in pursuance of that Act (*Re Lock, Ex parte Poppleton* (1890), 7 Morr. 184). See title COUNTY COURTS.

(*s*) *Re Grepe, Ex parte Grepe* (1885), 2 Morr. 298.

(*t*) *Re Hilton, Ex parte March* (1892), 9 Morr. 286; *Re Montague, Ex parte Ward* (1897), 4 Mans. 1.

(*a*) Bankruptcy Rules, r. 37 B.

(*b*) *Ibid.*, r. 93. Compare *Re a Bankruptcy Notice, Ex parte Official Receiver*, [1895] 1 Q. B. 609.

(*c*) Bankruptcy Act, 1883 (46 & 47 Vict. c. 52), s. 102 (3). The order will state whether it is to be a special or a common jury (Bankruptcy Rules, r. 95).

(*d*) Bankruptcy Rules, r. 96. The trial may be before the judge of the High Court, or otherwise as he may direct (*ibid.*). If the issues are not tried before him, they will be tried as if they were issues of fact sent down by the Chancery Division for trial in the King's Bench Division, and the finding of the jury will be indorsed by the officer on the record for trial, and by him sent to the senior bankruptcy registrar (*ibid.*, r. 97).

(*e*) *Ibid.*, rr. 38, 39, 40. The rules in force in the High Court and county courts respectively, as to payment into and out of court of money therein lodged as security for costs, will apply to money lodged in court (*ibid.*, r. 41).

SUB-SECT. 4. Motions and Practice thereon.

association approved by the court or the opposite party will be accepted instead of a bond or deposit (*f*).

How far general practice and procedure applicable.

530. As regards bankruptcy matters generally, where no other provision is made by the present bankruptcy statutes or the rules, the law, procedure, and practice as to such matters, existing when those statutes came into force, remain. And, except as provided by any bankruptcy rules, the Rules of the Supreme Court do not apply to any proceeding in bankruptcy (*g*).

SUB-SECT. 5.—*Evidence generally.*

London Gazette etc.

531. A copy of the *London Gazette* containing a notice inserted in it in pursuance of the Acts is evidence of the facts stated in it (*h*). So is a minute of proceedings at a meeting of creditors, signed at the same or next ensuing meeting, by a person describing himself as, or appearing to be, chairman of the meeting at which the minute is signed (*i*).

Evidence of proceedings.

532. Every bankruptcy court has a seal of which, as well as of the signature of the judge or registrar, judicial notice is taken (*k*); and any document, or copy of any document, of any kind made or used in the course of bankruptcy proceedings, will, if it appears to be sealed with the seal of any court having bankruptcy jurisdiction, or purports to be signed by the judge, or is certified to be a true copy by the registrar, be receivable in evidence in all legal proceedings (*l*).

Proceedings of Board of Trade.

533. Documents purporting to be orders or certificates made or issued by the Board of Trade, and to be sealed with its seal, or to be signed by a secretary or assistant secretary of the Board or any person authorised in that behalf by the President of the Board (*m*), will be received in evidence, and deemed to be such orders unless

(*f*) Bankruptcy Rules, r. 42.
In all cases where a person proposes to give a bond he must serve notice of the proposed sureties on the opposite party, and on the registrar (see *ibid.*, Appendix, Forms, No. 20), who thereupon appoints a time and place for the execution of the bond, and informs the obligee that he must then and there object, if at all, to the proposed sureties (*ibid.*, r. 43). The sureties make an affidavit of their sufficiency (*ibid.*, Forms, No. 21) unless the opposite party dispenses with it, and must attend for cross-examination, if required (*ibid.*, r. 44). The bond must be executed and attested in the presence of the registrar, or the official receiver, or a justice of the peace, or a solicitor (*ibid.*, r. 45). Where, in lieu of a bond, money is deposited the registrar forthwith gives notice of the deposit to the person to whom the security is to be given (*ibid.*, r. 46).

(*g*) *Ibid.*, r. 353.

(*h*) Bankruptcy Act, 1883 (46 & 47 Vict. c. 52), s. 132 (1). See, as to the effect of gazetting, *Ex parte Learoyd, Re Foulds* (1878), 10 Ch. D. 3; *Ex parte French, Re Trim* (1882), 47 L. T. 339.

(*i*) *Ibid.*, s. 133. Till the contrary is proved the meeting to which the minute relates will be deemed to have been duly held, and all resolutions thereat duly passed (*ibid.*).

(*k*) *Ibid.*, s. 137.

(*l*) *Ibid.*, s. 134.

(*m*) See as to this, *Re Johnstone, Ex parte Singleton* (1885), 2 Morr. 206; *Re Duncan, Ex parte Official Receiver*, [1892] 1 Q. B. 879, 882; *Re Vavasour*, [1900] 2 Q. B. 309.

the contrary is shown; and a certificate signed by the President that any order, certificate or act is the order, certificate or act of the Board, will be conclusive evidence of the fact certified (*n*).

Swearing of affidavits.

534. Affidavits (which expression includes statutory declarations, affirmations and attestations on honour (*o*)) may be sworn before a person authorised to administer oaths in the High Court, or in the Chancery Court of the County Palatine of Lancaster, or before any registrar of a bankruptcy court or any officer thereof authorised in writing by the judge thereof (*p*), or before a justice of the peace for the county or place in England or Wales where an affidavit is sworn (*q*), or, in the case of a person residing in Scotland or Ireland, before a judge ordinary, magistrate or justice of the peace, or in the case of a person who is outside Great Britain and Ireland before a magistrate, or justice of the peace, or other person qualified to administer oaths in the country where he resides, he being certified to be a magistrate or justice of the peace or so qualified by a British minister or British consul, or by a notary public (*r*).

Form and arrangement of affidavit.

Every affidavit must be drawn up in the first person, stating the description and place of abode of the deponent, and divided into paragraphs, numbered consecutively, each of them as nearly as possible confined to a distinct portion of the subject (*s*).

(*n*) Bankruptcy Act, 1883 (46 & 47 Vict. c. 52), s. 140. Appeals from the Board of Trade (as to which see *ibid.*, ss. 21 (3), 82 (1), 86 (2), 162 (4)) must be brought within twenty-one days (*ibid.*, s. 139), and heard in open court (Bankruptcy Rules, r. 6 (d)). Appeals from the official receiver must be brought within the same time, *ibid.*, s. 139.

(*o*) Bankruptcy Act, 1883 (46 & 47 Vict. c. 52), s. 168 (1).

(*p*) *Ibid.*, s. 135.

(*q*) Bankruptcy Act, 1890 (53 & 54 Vict. c. 71), s. 24.

(*r*) Bankruptcy Act, 1883 (46 & 47 Vict. c. 52), s. 135. No certificate is required where an affidavit is sworn before a British consul or vice-consul (*Re Magee, Ex parte Magee* (1885), 15 Q. B. D. 332). The court takes judicial notice of the seal or signature of a person authorised to take affidavits or to certify to such authority (Bankruptcy Rules, r. 58).

Affidavits may also be sworn before official receivers, and proofs of debts before their authorised clerks or assistant receivers (Bankruptcy Act, 1883, s. 68 (2), and Bankruptcy Rules, r. 219 A); and before trustees (Bankruptcy Act, 1883, Sched. II., r. 26). Except for proofs of debts, an affidavit cannot be sworn before a solicitor, or his clerk or partner, acting for the party for whom the affidavit is to be used, or before the agent of such solicitor, or before the party himself (Bankruptcy Rules, r. 56).

(*s*) *Ibid.*, rr. 48, 49. Costs will not be allowed for an affidavit substantially departing from the proper form (*ibid.*); and the costs of an affidavit which unnecessarily sets out hearsay, argumentative matters, or copies of, or extracts from, documents, will have to be paid for by the party filing the same (*ibid.*, r. 47).

The court may order scandalous matter to be struck out from an affidavit, and the costs of the application for the order to be paid as between solicitor and client (*ibid.*, r. 51). An affidavit may be received notwithstanding a defect in the title or jurat, or any other irregularity (*ibid.*, r. 54).

Where there are two or more deponents the names of the several persons making the affidavit should be inserted in the jurat, but if the affidavit of all the deponents is taken at one time by the same officer, it may be stated that it was sworn by both, or all, of the "above-named" deponents (*ibid.*, r. 50).

Interlineations or alterations must be authenticated by the initials of the officer, and in the case of an erasure the words or figures appearing at the

SUB-SECT. 5. **Evidence generally.**

Use of affidavits.

When an original affidavit is allowed to be used, it must first be stamped with the proper filing stamp, and when used left in court or chambers for filing. A sealed office copy of a filed affidavit can always be used (*t*). Where a special time is limited for filing affidavits, no affidavit filed after that time can be used except by leave (*a*).

Attendance of witnesses.

535. As to witnesses, a subpœna or subpœna *duces tecum* may be issued by the court, and a sealed copy thereof must be served personally on the witness by the person at whose instance the subpœna was issued, or by his solicitor or an officer of the court, or some person in their employ, within a reasonable time before the return day (*b*).

Costs of witnesses.

The court, whilst it may allow the costs of witnesses, whether they are examined or not, may limit the number to be allowed on taxation, and their allowance for attendance is not to exceed that in the prescribed scale of costs (*c*).

Depositions.

Where necessary the court may order an examination of a witness to be held at any place (*d*) before the court, or its officer, or any other person, and allow the deposition of such witness to be given in evidence (*e*).

Commission, discovery etc.

So too, there may be a commission or letter of request to examine witnesses in accordance with the practice in use in the High Court (*f*), and in accordance with the like practice an order for interrogatories or discovery of documents (*g*).

time of taking the affidavit to be written on the erasure must be re-written, and signed or initialled in the margin by the officer (Bankruptcy Rules, r. 52).

Where an affidavit is made by a person who appears to the officer taking the affidavit to be illiterate or blind, the officer should certify in the jurat that the affidavit was read in his presence to the deponent, and that the deponent seemed perfectly to understand it, and made his signature in his presence; if there is no such certificate there must be other evidence that the affidavit was read over to and apparently understood by the deponent (*ibid.*, r. 53).

(*t*) *Ibid.*, r. 55.

(*a*) *Ibid.*, r. 57; and, except by leave, no order made *ex parte* in court, founded on an affidavit, is of any force, unless the affidavit was actually made before the order was applied for, and produced and filed at the time of making the motion (*ibid.*).

(*b*) *Ibid.*, rr. 61, 62. Service may be proved by affidavit (r. 63). Disobedience to a subpœna or order for attendance may be dealt with as a contempt of court (*ibid.*, r. 70) if sufficient conduct-money, to which the witness is entitled under r. 71, has been tendered (*Re Batson, Ex parte Hastie* (1894), 1 Mans. 45). As to contempt by a member of Parliament, see *Re Armstrong, Ex parte Lindsay* (1891), 8 Morr. 271. By Bankruptcy Rules, r. 69, an order may be made for the attendance of a person to produce a document. The deposition of a deceased witness or a copy thereof, if sealed, may be admitted in evidence (Bankruptcy Act, 1883 (46 & 47 Vict. c. 52), s. 136).

(*c*) Bankruptcy Rules, rr. 64, 65.

(*d*) Within the British dominions (*Re Drucker* (No. 2), *Ex parte Basden*, [1902] 2 K. B. 210).

(*e*) Bankruptcy Rules, r. 66.

(*f*) *Ibid.*, r. 68. See R. S. C., Ord. 37, rr. 6, 6 A. See title PRACTICE AND PROCEDURE.

(*g*) Bankruptcy Rules, r. 72. Rules 67, 67 A provide for the taking of shorthand notes of evidence.

SUB-SECT. 6.—*Orders and Warrants.*

SUB-SECT. 6. Orders and Warrants.

536. Bankruptcy courts in England, Scotland and Ireland respectively will each enforce the orders of the others (*h*). And these courts, and every British court with jurisdiction in bankruptcy or insolvency, are bound to act in aid of and be auxiliary to each other in bankruptcy matters; and an order of the court seeking aid, with a request to the court whose aid is sought, will be sufficient authority to the latter court to enable it to exercise in regard to the matter of the request all the jurisdiction which either of the two courts in question could exercise in regard to similar matters (*i*).

Enforcement of orders throughout British dominions.

A warrant of an English bankruptcy court will be enforced in the British Islands, and elsewhere in the King's dominions, in the same manner as the warrant of a justice of the peace would be in these places in respect of an indictable offence (*k*).

A search warrant issued for the discovery of a debtor's property may be executed in the same way as an ordinary search warrant for property supposed to be stolen (*l*).

Search warrants.

Where the court commits a person to prison the commitment will be to such convenient prison as the court thinks expedient, and the gaoler is liable to a penalty of £100 if he refuse to receive a prisoner so committed (*m*).

Commitment.

SUB-SECT. 7.—*Time and Notices*

537. Where any limited time from or after any date or event is allowed for the doing of any act, or the taking of any proceeding, that limited time must be taken as exclusive of the day of that date, or of the happening of that event, and as commencing at the beginning of the next day; and the act or proceeding must be done or taken at latest on the last day of that limited time, unless that day is a Sunday, Christmas Day, Good Friday, or Monday or Tuesday in Easter week, or a day appointed for a public fast, humiliation or thanksgiving, or a day on which the court does not sit (*n*), in which case the act or proceeding may be done or taken on the next day which is not one of the days above specified (*o*). If the time limited is less than six days, Sunday, Christmas Day,

Computation of time.

(*h*) Bankruptcy Act, 1883 (46 & 47 Vict. c. 52), s. 117. As to preparation of orders, see Bankruptcy Rules, rr. 37 A, 37 B. As to request to another court, see *Re Bell* (1885), 2 Morr. 291; *Re Dobson, Ex parte Craig*, [1903] W. N. 155.

(*i*) Bankruptcy Act, 1883 (46 & 47 Vict. c. 52), s. 118. See *Re Firbank, Ex parte Knight* (1887), 4 Morr. 50; *Callender, Sykes & Co.* v. *Colonial Secretary of Lagos and Davies*, [1891] A. C. 460.

(*k*) Bankruptcy Act, 1883 (46 & 47 Vict. c. 52), s. 119 (1). See title MAGISTRATES.

(*l*) *Ibid.*, s. 119 (2). See also Bankruptcy Rules, r. 83, as to person to whom warrant will be addressed. As to seizure of property, see p. 75, *ante*.

(*m*) *Ibid.*, s. 120. As to committal of a debtor under s. 25 of that Act, see Bankruptcy Rules, r. 84; as to application to commit, see rr. 85, 86; as to suspension of issue of orders, see r. 87; as to committal of debtor or witness, examined before a registrar, refusing to answer questions, see r. 88.

(*n*) This expression means "a day on which the offices of the court are closed" (Bankruptcy Rules, r. 4 (3)).

(*o*) Bankruptcy Act, 1883 (46 & 47 Vict. c. 52), s. 141. So, too, if an act or proceeding is directed to be done or taken on a certain day and that day happens to be one of the days above specified, the act or proceeding may be done or taken on the next day afterwards which is not one of those days (*ibid.*).

SUB-SECT. 7. Time and Notices.

Good Friday, the next day after Good Friday, Monday and Tuesday in Easter week, and any other day on which the offices of the court are wholly closed, are to be excluded in computing that time (*p*).

Extension of time.

Where the time for doing any act or thing is limited, the court may extend the time, either before or after the expiration of it, on such terms as may seem fit (*q*).

Service by post.

538. All notices and other documents, for the service of which no special mode is directed, may be sent by prepaid post letter to the last known address of the person to be served (*r*). The letter must be registered where the notice is of an order or other proceeding in court (*s*).

Hours for service.

Generally, service of notices, orders or other proceedings must be effected before six o'clock in the afternoon, except on Saturdays, when it must be before two o'clock. Service effected after these hours will be deemed to be service on the following day, or the following Monday respectively (*t*).

Service in county court.

In a county court the high bailiff, and in the High Court such officer as may be appointed, must serve all documents which the court may require him to serve execute warrants and other process, attend the sittings of the court, and do such other things as may be required of him (*a*).

SUB-SECT. 8.—*Formal Defects.*

Consequences of formal defects.

539. Formal defects or irregularities do not invalidate proceedings, unless on objection made the court is of opinion that substantial injustice has been caused by any such defect or irregularity and cannot be remedied by an order of the court (*b*). Where an irregularity occurs in or about a bankruptcy notice the court will be less inclined to remedy it than if it had occurred in or about a bankruptcy petition (*c*).

(*p*) Bankruptcy Rules, r. 4 (2). See generally, as to calculation of time, *Re North, Ex parte Hasluck*, [1895] 2 Q. B. 264; *Re Hanson, Ex parte Forster* (1887), 4 Morr. 98; and title TIME.

(*q*) Bankruptcy Act, 1883 (46 & 47 Vict. c. 52), s. 105 (4). See also Bankruptcy Rules, r. 351, by which the court may, in special circumstances, and for good cause, extend or abridge any limited time. Sect. 105 (2) gives a general power of adjournment.

(*r*) *Ibid.*, s. 142. See also p. 51, *ante*. Where notice by post is adopted, the service will date, not from the date of posting, but from the date when the letter would reach the respondent. See *Re Alderson, Ex parte Kirby* (No. 1) (1891), 8 Morr. 93. See also *Ex parte Arden* (1884), 14 Q. B. D. 121; *Re Faulconer, Ex parte Cochrane* (1889), 6 Morr. 206. Notice to the sheriff of an injunction may be sent by telegram (*Ex parte Langley, Ex parte Smith, Re Bishop* (1879), 13 Ch. D. 110).

(*s*) Bankruptcy Rules, r. 92.

(*t*) *Ibid.*, r. 90. This rule does not apply to notice to the sheriff of a bankruptcy petition under the Bankruptcy Act, 1890 (53 & 54 Vict. c. 71), s. 11 (2) (*Lole* v. *Betteridge*, [1898] 1 Q. B. 256). Notices, orders, documents, and other written communications, which do not require personal service, may be served on a solicitor (if any) acting in a matter by leaving the same at his address for service (Bankruptcy Rules, r. 89).

(*a*) *Ibid.*, r. 91.

(*b*) Bankruptcy Act, 1883 (46 & 47 Vict. c. 52), s. 143 (1). See also Bankruptcy Rules, r. 350, which enables the Court to set aside, amend, or otherwise deal with irregular proceedings.

(*c*) *Re Collier, Ex parte Dan Rylands, Ltd.* (1891), 8 Morr. 80; *Re Howes,*

SUB-SECT. 9.—*Costs.*

SUB-SECT. 9

Costs.

540. The subject of the costs of proceedings in bankruptcy matters has been incidentally dealt with in the foregoing pages. Generally, subject to any provisions in the bankruptcy statutes or rules, the costs of and incidental to any proceeding in court are in the discretion of the court (*d*). In awarding costs the court may direct them to be taxed and paid as between party and party, or as between solicitor and client, or order full costs, charges, and expenses, or a lump sum; but in the absence of any express direction the costs of an opposed motion follow the event, and are taxed as between party and party (*e*). In a county court the taxation must be by the registrar in person (*f*).

Costs in discretion of court.

Different scales of solicitors' costs varying with the estimated amounts of the assets of the debtor are prescribed by the Bankruptcy Rules (*g*). And, except in the case of the charges of the solicitor for the petitioning creditor, if the estimated assets of the debtor do not exceed £300, only three-fifths of the ordinary charges, disbursements being added, will be allowed in all proceedings in which costs are payable out of the estate; and if the assets are found not to exceed £300, but costs on the ordinary scale have been allowed, the excess will be disallowed, and, if paid, must be repaid (*h*).

Scale of costs.

Ex parte Hughes, [1892] 2 Q. B. 628; *Re Miller, Ex parte Miller* (1893), 10 Morr. 183; *Re O. C. S. (A Debtor), Ex parte the Debtor*, [1904] 2 K. B. 161. Compare *Re Low, Ex parte Gibson*, [1895] 1 Q. B. 734, where the defect was not material.

See also *Re Fiddian, Squire & Co., Ex parte Fiddian, Squire & Co.* (1892), 9 Morr. 95, as to amending, before receiving order, a defect in a petition. When three months have elapsed since the act of bankruptcy, a petition will not be amended by adding a new petitioning creditor (*Re Maund, Ex parte Maund*, [1895] 1 Q. B. 194). See as to amending a petition improperly attested, *Re a Debtor* (1902), 86 L. T. 688. See also *Ex parte Vanderlinden, Re Pogose* (1882), 20 Ch. D. 289.

(*d*) Bankruptcy Act, 1883 (46 & 47 Vict. c. 52), s. 105 (1). But where an issue is tried by a jury, the costs follow the event, unless upon application made at the trial, for good cause shown, the judge otherwise orders (*ibid.*). As to what is meant by "good cause," see title PRACTICE AND PROCEDURE.

(*e*) Bankruptcy Rules, r. 108. The express direction must be given when the costs are awarded (*Ex parte Shoolbred, Re Angell* (1884), 14 Q. B. D. 298). Without a special order costs are not given against an official receiver or trustee in actions against them as representing the estate (r. 108 (3)). See and compare *School Board for London* v. *Wall Brothers* (1891), 8 Morr. 202, and the cases cited in note (*r*), p. 128, and note (*n*), p. 135, *ante*.

When costs are to be taxed, an office copy of the order is produced to the taxing master, who gives an allocatur, signed and dated (Bankruptcy Rules, r. 110). He may in his discretion disallow evidence, though recited in the order (*Re Abrahams, Ex parte the Trustee* (1895), 2 Mans. 369).

It is not the rule in bankruptcy that a solicitor must pay the costs of taxation if more than one-sixth is taxed off his bill (*Ex parte Marsh, Re Marsh* (1885), 15 Q. B. D. 340). See and compare *Re Allingham* (1886), 32 Ch. D. 36.

(*f*) Bankruptcy Rules, r. 111. It is doubtful if a county court judge can review a taxation of a sheriff's costs (*Re Woodham, Ex parte Conder* (1887), 20 Q. B. D. 40.

(*g*) See Bankruptcy Rules, Appendix, Part II.

(*h*) Bankruptcy Rules, r. 112. This rule only applies to costs which are payable by the Bankruptcy Acts out of the estate, and not to costs of proceedings in court, which are in the discretion of the court (*Re Dowson, Ex parte Jaynes* (1888), 5 Morr. 240), nor to conveyancing costs (*Re Parfitt* (1889), 23 Q. B. D. 40). But it applies to the costs of a trustee's application for leave to disclaim a lease (*Re Procter*, [1891] 2 Q. B. 433), and to his costs out of the estate of an unsuccessful

SUB-SECT. 9. Costs.

Where a bill of costs is taxed under a special order, and it appears from the order that the costs are payable otherwise than out of the estate, the taxing officer must note on the order by whom or how the costs are to be paid (*i*).

Application for costs.

Where a person who is party to or affected by a proceeding desires to apply for his costs of or incident to the proceeding, and does not do so at the time of the proceeding, he must serve notice of his application on the official receiver and trustee (if any), but the court will not allow him the costs of the application unless the application could not have been made at the time of the proceeding (*k*).

Review of county court taxation.

The Board of Trade may require a review by a bankruptcy taxing master of the High Court of a taxation by a county court registrar of the costs of a solicitor or other person employed by the official receiver or trustee (*l*); but not, it appears, of the taxation of the costs of strangers who have been in litigation with the trustee (*m*).

Priority of costs and charges.

541. The assets in every matter which remain after payment of the actual expenses incurred in realising any of them (*n*) are, subject to any order of the court, liable to the following payments, and in the following order of priority: First, the actual expenses incurred by the official receiver in protecting the property and assets of the debtor, or any part of it, and any expenses or outlay incurred by him, or by his authority, in carrying on the debtor's business; next, the fees, percentages, and charges payable for judicial and official administration as set out in the Scale of Fees prescribed by the Lord Chancellor and the Treasury, and any other fees payable

motion against a stranger (*Re Martha Marsh, Ex parte Board of Trade* (1894), 1 Mans. 486). Rule 112 A provides for a re-taxation where assets realise less than the estimated amount; r. 112 B allows certain additional items to the costs of a petitioning debtor's solicitor; and r. 113 requires such solicitor to give credit in his bill of costs for any sum or security received from the debtor as a deposit on account of the costs and expenses of the petition. By r. 126, if after the presentation of a creditor's petition a debtor's petition is presented and a receiving order made on it, no costs out of the estate will be allowed to the debtor or his solicitor, unless the court thinks that the estate has benefited by the debtor's petition, or that there are special circumstances which make it just that costs should be allowed.

(*i*) Bankruptcy Rules, r. 114. Compare, as to conveyancing business, *Re Garner, Ex parte Pedley*, [1906] 2 K. B. 213.

(*k*) *Ibid.*, r. 123. As to sheriff's costs, see p. 274, *ante*, and Bankruptcy Rules, rr. 118, 119, 119 A. See also *Re Ludmore* (1884), 13 Q. B. D. 415; *Re Finch, Ex parte Sheriff of Essex* (1891), 8 Morr. 284; *Re Wells & Croft, Ex parte Sheriff of Kent* (1893), 10 Morr. 69; *Re Hurley* (1893), 10 Morr. 120; *Re Thomas, Ex parte Sheriff of Middlesex*, [1899] 1 Q. B. 460; *Re Beeston*, [1899] 1 Q. B. 626; *Re English & Ayling, Ex parte Murray & Co.*, [1903] 1 K. B. 680.

(*l*) Bankruptcy Rules, r. 124; *Re Hunt, Ex parte Board of Trade*, [1898] 1 Q. B. 287.

(*m*) *Re Hunt, Ex parte Board of Trade, supra.* Where a person is dissatisfied with the review of the taxing master he may apply to the High Court (*Re Alison, Ex parte Jaynes*, [1892] 2 Q. B. 587). *Semble*, r. 124, *supra*, would not apply where there is no trustee, and where, a composition having been accepted, there is no estate (*Re Rodway, Ex parte Phillips* (1884), 1 Morr. 228).

(*n*) The taxed costs of the trustee's solicitor, at all events so far as they are unconnected with a sale or realisation of the assets, would not be included in these expenses (*Re Bright, Ex parte Wingfield & Blew*, [1903] 1 K. B. 735). As to charging order, see and compare *Re Humphreys, Ex parte Lloyd-George & George*, [1898] 1 Q. B. 520.

SUB-SECT. 9. Costs.

to, or costs, charges and expenses incurred or authorised by, the official receiver (*o*); the fee which under that scale must be affixed to the copy of the cash book when sent for audit; the deposit lodged by the petitioning creditor; the deposit lodged on any application for an interim receiver; the remuneration of the special manager (if any); the taxed costs of the petitioner (*p*); the remuneration and charges of any person appointed to assist the debtor in the preparation of his statement of affairs; any allowance made to the debtor by the official receiver; the taxed charges of any shorthand writer appointed by the Court (*q*); the trustee's necessary disbursements other than actual expenses of realisation already mentioned; the costs of any person properly employed by the trustee with the sanction of the committee of inspection; any allowance made to the debtor by the trustee with the sanction of the committee of inspection; the trustee's remuneration; the actual out-of-pocket expenses necessarily incurred by the committee of inspection, subject to the approval of the Board of Trade (*r*).

The costs of proceedings in the High Court not in bankruptcy will not be set off against the costs of proceedings in bankruptcy (*s*); and therefore debtor's and creditor's costs in bankruptcy proceedings cannot be set off where the creditor makes costs already payable to him a part of the debt on which the bankruptcy petition is founded (*t*).

SUB-SECT. 10.—*Exemptions from Stamp Duty.*

Documents exempt.

542. Every deed, conveyance, assignment, surrender, admission, or other assurance relating solely to freehold, leasehold, copyhold, or customary property, or to any mortgage charge or other incumbrance on, or any estate right or interest in, any real or personal property which is part of the estate of any bankrupt (*a*), and which after the execution of any such deed or other document, either at law or in equity, is or remains the estate of the bankrupt or of the trustee (*b*), and every power of attorney, proxy paper, writ,

(*o*) These would include the costs of the notes of a shorthand writer appointed at the instance of the official receiver for the public examination (Bankruptcy Rules, r. 125 A).

(*p*) These as a rule would include the costs of a rehearing, both before the registrar and in the Court of Appeal (*Re Bright, Ex parte Wingfield & Blew*, [1903] 1 K. B. 735). The trustee cannot refuse to pay the costs of the solicitor of a petitioner on the ground that he has a claim against the solicitor for an alleged fraudulent preference by the debtor (*Re Coster & Tack, Ex parte Raphael* (1890), 7 Morr. 284).

(*q*) See and compare Bankruptcy Rules, r. 125 A, and rr. 67, 67 A.

(*r*) Bankruptcy Rules, r. 125.

(*s*) *Ex parte Griffin, Re Adams* (1880), 14 Ch. D. 37; *Re Bassett, Ex parte Lewis*, [1896] 1 Q. B. 219.

(*t*) *Re a Debtor, Ex parte Petitioning Creditors*, [1907] 2 K. B. 896.

(*a*) For the purposes of this section (Bankruptcy Act, 1883 (46 & 47 Vict. c. 52), s. 144) "bankruptcy" includes any proceeding under the Act, whether before or after adjudication, and whether there is any adjudication or not, and "bankrupt" includes any debtor proceeded against under the Act (Bankruptcy Rules, r. 60).

(*b*) Thus a trustee need not pay stamp duty on a *contract* to sell real property, which he subsequently conveys to the purchaser (*Flather* v. *Stubbs* (1842), 2 Q. B. 614).

SUB-SECT. 10. Exemptions from Stamp Duty.

order, certificate, affidavit, bond, or other instrument or writing, relating solely to the property of the bankrupt, or to any proceeding under any bankruptcy, is exempt from stamp duty, except in respect of the fees prescribed by the bankruptcy statutes (*c*).

SECT. 18.—*Bankruptcies and Insolvencies pending under Repealed Statutes.*

Bankruptcies before 1869.

543. A feature of the insolvency law of England has been that from time to time different systems of law and administration have been in force. Some bankruptcies and insolvencies which were begun long ago under systems which existed before the passing of the bankruptcy laws now in force are still pending, and the present bankruptcy laws have provided means for winding up the estates under those bankruptcies and insolvencies (*d*).

Official and creditors' assignees.

Under the various bankruptcy and insolvency laws which were in force from time to time before 1869 the estates of bankrupts, and insolvent debtors, and debtors who had made statutory arrangements with their creditors were vested in official assignees, or in creditors' assignees jointly with official assignees, or in creditors' assignees only, the realisation and distribution of the estates being governed by the statutes in force at the time of the commencement of the particular proceedings; and the bankrupts or insolvent debtors were able to obtain certificates and orders of discharge from their debts under the provisions of those statutes (*e*).

Jurisdiction under present mode of administration.

By a series of legislative provisions passed and orders made under them from time to time, the duty of winding up those estates has devolved as to those pending in what may be termed the London district on the senior official receiver of the High Court, and as to those pending in the bankruptcy districts of county courts on the official receivers of those courts; and the powers formerly exercisable by the commissioners or judges of the bankruptcy court from time to time established under the statutes above mentioned are vested as to the bankruptcies and insolvencies in the London district in the High Court judge and registrars, and as to those in the county court bankruptcy districts in the judges and registrars of the county courts (*f*).

Law governing administration.

The rights of creditors as to proofs of debt, dividends, securities,

(*c*) Bankruptcy Act, 1883 (46 & 47 Vict. c. 52),s. 144. See Scale of Fees and Percentages. As to defacement of stamps on stamped documents, see Bankruptcy Rules, r. 59.

(*d*) See p. 5, *ante*, where the principal bankruptcy statutes are referred to. The repealing sections of successive Bankruptcy Acts have always preserved rights under pending proceedings.

(*e*) Bankruptcy Repeal and Insolvent Court Act, 1869 (32 & 33 Vict. c. 83); Bankruptcy Act, 1883 (46 & 47 Vict. c. 52), s. 153; Bankruptcy (Discharge and Closure) Act, 1887 (50 & 51 Vict. c. 66), s. 4.

(*f*) See *Ex parte Edwards, Re Tollemache* (1885), 14 Q. B. D. 415, and *Ex parte Revell, Re Tollemache* (No. 1) (1884), 13 Q. B. D. 720; *Ex parte Revell, Re Tollemache* (No. 2) (1884), 13 Q. B. D. 727, where the bankruptcy was under stat. 6 Geo. 4, c. 116, and amending statutes, and *Ex parte Charman, Re Clagett*, [1887] W. N. 184, where the proceedings were under the Insolvent Debtors Acts and the Bankrupt Law Consolidation Act, 1849, and the Bankruptcy Act, 1854.

SECT. 18. Old Bankruptcies.

and other matters which arise in the course of administration are governed by the laws which prevailed when the bankruptcy or insolvency originated; and for those purposes the High Court and existing county courts have to administer the provisions of statutes which for all other purposes are repealed (*g*).

Bankruptcies between 1869 and 1883.

544. As regards the bankruptcy and insolvency statutes which were in force from 1869 to 1883, by legislative provisions in the present bankruptcy laws all bankruptcies under those statutes have been closed (*h*), and provision has been made by which the estates of bankrupts and debtors whose estates are being liquidated by statutory liquidations or arrangements are now wound up by the official receivers of the courts in which the proceedings originated or by specially appointed officers; and bankrupt or liquidating debtors can apply for, and in proper cases obtain, orders of discharge from their debts (*i*).

Unclaimed funds.

545. Unclaimed funds remaining in the hands of any officer or person intrusted with the administration of a bankrupt or insolvent debtor's estate pursuant to any statute dealing with bankrupts or insolvent debtors in force before January 1, 1884, must be paid into the Bankruptcy Estates Account, and the Board of Trade has power to make orders requiring any such officer or person to account for such funds, and to audit his accounts, which orders the court exercising bankruptcy jurisdiction can enforce (*k*).

The number of bankruptcies and insolvencies pending at the time when the present system was first established, and which have to be wound up under the systems prevailing at the time when they were instituted as modified by the present system, is very small, and naturally tends to become smaller as time goes on (*l*).

Part II.—Compositions and Arrangements apart from the Bankruptcy Acts.

SECT. 1.—*General Principles.*

Modes of arranging with creditors.

546. Independently of bankruptcy law, an insolvent debtor can enter with the general body of his creditors, or with some of his creditors, or with classes of his creditors, into a valid arrangement by which, without paying his debts in full, he obtains a release from

(*g*) Bankruptcy (Discharge and Closure) Act, 1887 (50 & 51 Vict. c. 66), s. 3; and compare ss. 49, 54 of the Bankruptcy Act, 1869 (32 & 33 Vict. c. 71).

(*h*) Bankruptcy Act, 1883 (46 & 47 Vict. c. 52), ss. 159—161.

(*i*) Bankruptcy (Discharge and Closure) Act, 1887 (50 & 51 Vict. c. 66), s. 2. The operation of this enactment is almost, if not quite, exhausted.

(*k*) Bankruptcy Act, 1883 (46 & 47 Vict. c. 52), s. 162 (2).

(*l*) Quite lately (October, 1907) an application for a certificate of discharge under the Bankruptcy Law Consolidation Act, 1849 (12 & 13 Vict. c. 106), was made by a person who had become bankrupt in 1852.

SECT. 1. General Principles.

the claims of the arranging creditors, or temporary or permanent freedom from process of law for the recovery of the debts due to them (*m*). These arrangements usually take the form either of a composition with creditors, or an assignment of the arranging debtor's property to a trustee for their benefit.

Deed of inspectorship etc.

There are also other forms of arrangement which can be, but are now seldom, used, such as a deed of inspectorship entered into for the purpose of carrying on or winding up a business, or an agreement or letter of licence made or given for the purpose of authorising the debtor or some other person nominated by his creditors to manage, carry on, realise, or dispose of the debtor's business with a view to the payment of his debts (*n*).

The objects of such arrangements, and, in effect, the grounds on which the law gives validity to them and will enforce them, are, firstly, equality among creditors, and, secondly, the temporary or permanent protection of the debtor's estate from being swept away by legal proceedings by some individual creditor or creditors for recovery of the debts due to them.

SECT. 2.—*Composition with Creditors.*

Effect of composition.

547. A composition is an agreement between the compounding debtor and all or some of his creditors by which the compounding creditors agree with the debtor, and (expressly or impliedly) with each other, to accept from the debtor payment of less than the amounts due to them in full satisfaction of the whole of their claims (*o*).

Form of agreement.

A composition agreement may be made in writing or verbally, or partly in writing and partly verbally (*p*).

Consideration for discharge.

The consideration which in such a case enables the acceptance of part of a debt to operate as a discharge of the whole debt is the mutual agreement of the creditors to forego parts of their claims (*q*).

Different methods of making composition.

548. A composition agreement usually takes the form of an agreement in writing by the debtor to pay the agreed composition in cash by instalments on specified dates, and a guarantee by sureties to pay the amounts of the instalments if the debtor fails to pay them. Sometimes negotiable instruments (bills of exchange or promissory notes) for the amounts payable under the composition arrangement

(*m*) See, as to the effect of a covenant not to sue, *Bateson* v. *Gosling* (1871), L. R. 7 C. P. 9.

(*n*) For forms of deed of inspectorship, see Encyclopædia of Forms, Vol. II., pp. 314 *et seq.*

(*o*) *Re Hatton* (1872), 7 Ch. App. 723, *per* MELLISH, L.J., at p. 726; *Slater* v. *Jones* (1873), L. R. 8 Exch. 186, at pp. 193, 194.

(*p*) Occasionally compositions are effected simply by the creditors mutually accepting the composition offered and giving receipts in full.

(*q*) *Norman* v. *Thompson* (1850), 4 Exch. 755; *Carey* v. *Barrett* (1879), 4 C. P. D. 379): "It is a good consideration for one to give up part of his claim that another should do the same." And see *Couldery* v. *Bartrum* (1881), 19 Ch. D. 394, *per* JESSEL, M.R., at p. 399. Where the composition is by deed, consideration is not necessary to support it, inasmuch as the acceptance of less than the amount of a debt in discharge of the whole debt is valid if made under seal (*Foakes* v. *Beer* (1884), 9 App. Cas. 605).

are given to the creditors, or to a trustee for them (*r*). In that event the agreement to pay the composition should not be under seal, because the obligation of the debtor and sureties on the negotiable instruments would merge in the agreement under seal (*s*).

Assignment.

Sometimes the payment of the instalments is secured by an assignment by the debtor of his property to a trustee, on trust, if the instalments of the composition are not paid, to realise the property and apply it towards satisfying the unpaid part of the composition (*t*). An objection to this latter method is that the assignment would operate as an act of bankruptcy, whereas a simple composition arrangement with sureties does not of itself operate as an act of bankruptcy, although an act of bankruptcy will be committed if in the negotiations for the composition notice of suspension of or intention to suspend payment is given by the compounding debtor (*t*). The composition agreement usually contains further a release by the creditors of the debts due to them, or an agreement by the creditors not to enforce their claims by legal proceedings as long as the instalments are duly paid and the provisions of the composition agreement are observed by the debtor, and that on payment of the entire composition the debtor shall be released from the whole of the creditors' claims, subject in each case to a proviso that the arrangement is to be at an end and the creditors remitted to their original rights if the composition or any instalment is not duly paid, or if proceedings in bankruptcy are effectively taken against the debtor (*r*). But of course the provisions of every composition agreement will vary with the circumstances of the case to which it applies.

Default by debtor.

Where a composition agreement is not made under the provisions of a statute, the effect of the debtor making default in payment of the composition itself or an instalment depends upon the terms of the composition deed. If the effect of the arrangement is that the creditors accept the payment of the composition in discharge of their debts, then usually a failure by the debtor to comply with his obligation will entitle the creditors to sue him for the whole of the balance of their debts. But if the effect of the arrangement is that the creditors accept the promise of the debtor with or without a surety in satisfaction of their debts, on default by the debtor the creditors can only sue for the balance of the amount of the composition (*u*).

SECT. 3.—*Assignment to a Trustee for the Benefit of a Debtor's Creditors.*

Assignment to trustee for benefit of creditors.

549. A method of arrangement of an insolvent debtor's affairs which the law recognises is an assignment (*v*) of the debtor's property to a trustee for realisation and distribution of the proceeds rateably

(*r*) For forms of composition, see Encyclopædia of Forms, Vol. II., pp. 281 *et seq.*

(*s*) *Owen* v. *Homan* (1851), 3 Mac. & G. 378.

(*t*) Bankruptcy Act, 1883 (46 & 47 Vict. c. 52), s. 4 (1) (a), (h). See pp. 14, 32, *ante*.

(*u*) As to the revival of a creditor's debt on failure by the debtor to pay a composition, see *Newell* v. *Van Praagh* (1874), L. R. 9 C. P. 96 (a case of a composition under the Bankruptcy Act, 1869).

(*v*) For forms of assignment, see Encyclopædia of Forms, Vol. II., pp. 231 *et seq.*

SECT. 3. Assignment for Benefit of Debtor's Creditors.

amongst all the debtor's creditors, or amongst those who assent to and take the benefit of the assignment. Such an assignment operates in effect to place the administration of the debtor's estate in the hands of a trustee for the benefit of the debtor's creditors. Usually an assignment of an arranging debtor's property is made by a deed executed by the debtor assigning to a trustee all, or substantially all, the debtor's property upon trusts declared in the deed, by which the assigned property is to be held and applied for the benefit of the creditors, and which deed may, and generally does, provide for the exercise by the creditors or a committee appointed by them of some control over the trustee's administration of the trust estate, and for the release of the debtor from, or suspension of, legal proceedings for the recovery of the debts due to the assenting creditors (*w*).

Effect of such assignment.

The assignment is the voluntary act of the arranging debtor (*a*). It is by virtue of his voluntary act alone that the assignment is operative to vest the property comprised in it in the trustee, and the trusts to which the assignment is subject are those which the debtor himself creates (*b*). The deed becomes operative to release or suspend the operation of creditors' claims by virtue of the assent of creditors to it; and it only binds those creditors who in writing or otherwise expressly or impliedly assent to it.

Revocation.

In the first instance an assignment to a trustee for the benefit of the assignor's creditors operates as a mere revocable mandate to the assignee, and until communicated to the creditors of the assignor or some of them is revocable by the assignor; and if he becomes bankrupt while the assignment is revocable, it will be revoked by the bankruptcy (*c*).

Enforcement.

When an assignment creates a trust for creditors the High Court, or, if the amount of property involved is within the limit of county court jurisdiction, a county court, will enforce the trusts, and decide disputed questions which arise under it (*d*).

Modes of assigning.

550. Arrangements by assignment of a debtor's property to a trustee for the benefit of the debtor's creditors are usually effected in one of two ways. One way is where the insolvent debtor without communication with his creditors first assigns his property to a trustee selected by himself on trust for their benefit, and then obtains the assent of all or some of his creditors to the arrangement (*e*). The other way is where, before making any assignment, the debtor calls his creditors together to a meeting, or the creditors themselves meet, and the creditors agree to forbear from enforcing their claims on the condition that the debtor assigns his property

(*w*) See Encyclopædia of Forms, Vol. II., pp. 231 *et seq.*

(*a*) *Wallwyn* v. *Coutts* (1815), 3 Mer. 707; *Gibbs* v. *Glamis* (1841), 11 Sim. 584.

(*b*) *Johns* v. *James* (1878), 8 Ch. D. 744, 749, 750.

(*c*) *Acton* v. *Woodgate* (1833), 2 My. & K. 492; *Siggers* v. *Evans* (1855), 5 E. & B. 367; *Harland* v. *Binks* (1850), 15 Q. B. 713; *Gibbs* v. *Glamis* (1841), 11 Sim. 584; *Re Ashby, Ex parte Wreford*, [1892] 1 Q. B. 872; *Ex parte Snowball, Re Douglas* (1872), 7 Ch. App. 547.

(*d*) See *Re Budgett*, [1894] 2 Ch. 557; R. S. C., Ord. 55, rr. 3, 4; County Courts Act, 1888 (51 & 52 Vict. c. 43), s. 67.

(*e*) For an example, see *Re Woodroff, Ex parte Woodroff* (1897), 4 Mans. 46.

SEC. 3. Assignment for Benefit of Debtor's Creditors.

to a trustee chosen at the meeting, and on trusts of which the creditors approve. When the first method is adopted it sometimes operates to injure the interests of the creditors (*f*). The latter method is often beneficial. Whether one or the other of these methods is adopted, the assignment becomes operative to create a valid title in the trustee and valid enforceable trusts for the benefit of the creditors as soon as the deed has been executed and creditors have assented to it.

SECT. 4.—*Registration of Arrangements.*

Necessity for registration.

551. When an arrangement by a debtor with the general body of his creditors is made by a deed or a written instrument, the deed or instrument must be registered in accordance with provisions to be hereinafter explained, otherwise it will be wholly void and inoperative (*g*).

To what instruments applicable.

The arrangements by a debtor (*h*) with his creditors, which by law are required to be registered, and which in the statutes relating to the matter are described by the term "deed of arrangement," include the following instruments when made by a debtor for the benefit of the debtor's creditors generally, that is to say, for the benefit of all creditors who may assent to and take the benefit of it, namely:—an assignment of the debtor's property (*i*); a deed of or agreement for a composition (*k*); a deed of inspectorship entered into for the purpose of carrying on or winding up a business (*l*); a letter of licence authorising the debtor or any other person to manage, carry on, realise, or dispose of a business with a view to the payment of debts (*m*); an agreement or instrument entered into for the purpose of carrying on or winding up the debtor's business, or authorising the debtor or any other person to manage, carry on, realise, or dispose of the debtor's business with a view to the payment of his debts (*n*).

A deed of arrangement by a limited joint stock company need not be registered (*o*).

Time for registration.

552. An instrument of arrangement of which registration is necessary must be stamped (*p*) and registered within seven days after its

(*f*) See *Davis* v. *Petrie*, [1905] 2 K. B. 528, where the trustee absconded after collecting debts and property due to and belonging to the arranging debtor.

(*g*) Deeds of Arrangement Act, 1887 (50 & 51 Vict. c. 57), s. 5. See *Re Rileys, Ltd.*, [1903] 2 Ch. 590. A deed of assignment which is principally intended for the benefit of the debtor, and only incidentally for the benefit of his creditors, is not required to be registered (*Re Hobbins, Ex parte Official Receiver* (1899), 6 Mans. 212).

(*h*) Debtor means "debtor subject to the English Bankruptcy Acts" (*Dulaney* v. *Merry & Son*, [1901] 1 K. B. 536, at p. 547).

(*i*) Deeds of Arrangement Act, 1887 (50 & 51 Vict. c. 57), s. 4 (2) (a).

(*k*) *Ibid.*, s. 4 (2) (b).

(*l*) *Ibid.*, s. 4 (2) (c).

(*m*) *Ibid.*, s. 4 (2) (d).

(*n*) *Ibid.*, s. 4 (2) (e). An assignment by a debtor to specified creditors without an option to the general body to come in under it, is not an arrangement which needs registration under the Act (*Re Saumarez, Ex parte Salaman*, [1907] 2 K. B. 170, explaining *Hedges* v. *Preston* (1899), 80 L. T. 847).

(*o*) *Re Rileys, Ltd., supra.*

(*p*) Deeds of Arrangement Act, 1887 (50 & 51 Vict. c. 57), s. 6 (2). And see

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first execution by the debtor or any creditor, or, if executed outside England or Ireland, within seven days of the date on which it would have arrived in England or Ireland if posted within a week of its execution. If not so registered, the instrument is void (*q*).

Procedure on registration.

553. A copy of the instrument and schedules attached must be filed with the registrar with an affidavit verifying the time of execution, and containing a description of the residence and occupation of the debtor and his place of business, and an affidavit of the debtor stating the total estimated amount of property and liabilities included under the arrangement, and the total amount of the composition, if any, payable thereunder, and the names and addresses of his creditors (*r*); and the registrar must as soon as possible after the presentation of the deed for registration enter in the register kept for the purpose an abstract of the instrument with the prescribed particulars (*s*).

Indorsement on copy of deed for filing.

The copy of the instrument presented for filing must bear an indorsement by the person presenting it of the name of the debtor, the date of the instrument and of its filing, the total amount of the duty with which it is stamped, and a certificate either by the debtor's solicitor or the person presenting the instrument that the copy is a correct one, and a statement of how many folios it contains (*t*).

Certificate of registration.

When the instrument has been registered a certificate to that effect, with the date, must be indorsed on the original instrument sealed with the seal of the Central Office of the Supreme Court (*u*).

Local registration of copy of deed.

It is the registrar's duty to forward within three days of registration a copy of any registered deed to the registrar of any county court in whose district outside the London bankruptcy district the

Re Hertage (1896), 3 Mans. 297, deciding that the amount of the necessary stamps must be found by the trustee, if there are no assets. Besides the inland revenue duty (as to which see title REVENUE), an additional stamp at the rate of 1*s.* for every £100 or part thereof of the sworn value of the property is required (*ibid.*, s. 6 (2)).

(*q*) Deeds of Arrangement Act, 1887 (50 & 51 Vict. c. 57), s. 5. Compare also Deeds of Arrangement Amendment Act, 1890 (53 & 54 Vict. c. 24). A deed of arrangement valid in a foreign country and executed by a foreign debtor abroad need not be registered in England in order to establish the trustee's title to goods in England (*Dulaney* v. *Merry & Son*, [1901] 1 K. B. 536).

As to who is the proper registrar, see Deeds of Arrangement Act, 1887 (50 & 51 Vict. c. 57), s. 8 (1), (2); *Re Hobbins, Ex parte Official Receiver* (1899), 6 Mans. 212.

(*r*) Deeds of Arrangement Act, 1887 (50 & 51 Vict. c. 57), s. 6 (1). For forms of affidavit, see Deeds of Arrangement Act Rules, 1888, r. 3, Appendix, Forms, Nos. 1—3. See *Maskelyne and Cooke* v. *Smith*, [1903] 1 K. B. 671 (the omission of the name of a creditor does not make the deed bad); *Chaplin* v. *Daly* (1894), 2 Mans. 1 (secured creditors need not be included, but only those unsecured creditors in whose favour the deed has been given).

(*s*) Deeds of Arrangement Act, 1887 (50 & 51 Vict. c. 57), s. 7. The particulars are—(a) date of the deed; (b) name, address, and description of the debtor, his place of business, title of his firm, and name and address of trustee under the deed; (c) short statement of the nature and effect of the deed; (d) date of registration; (e) amount of property and liabilities thereunder as estimated by the debtor. As to forms, see Deeds of Arrangement Act Rules, 1888, r. 4, Appendix, Forms, No. 4.

(*t*) Deeds of Arrangement Act Rules, 1888, r. 5.

(*u*) *Ibid.*, r. 6. As to indorsements of copies forwarded to county courts, see r. 7.

residence or business of any debtor party to the arrangement is situated (*a*). The county court registrar must file the copy, and permit inspection of it or allow copies and extracts to be made, as in the case of the registered instrument (*b*).

Inspection etc. of register.

Any person on payment of the fees for the time being prescribed for an office copy of a judgment is entitled to an office copy of any instrument (*c*), or at all reasonable times on payment of a fee of one shilling or such other fee as may be prescribed may search the register or inspect and make extracts from any registered instrument (*d*). There is no necessity to make written application for leave or to give particulars of what is required, but the extracts must be confined to the dates of execution and registration, the names, addresses, and descriptions of the debtor and parties to the instrument, and a short statement of its nature and effect (*e*). An office copy of or extract from a registered deed or instrument is in all courts and before all arbitrators and other persons *primâ facie* evidence of the deed or instrument, and of its due registration and the date of registration (*c*).

Rectification of register.

Where the High Court is satisfied that any omission to register or to fill in any necessary particulars is accidental or due to something outside the debtor's control, the court may extend the time or order rectification of the register subject to any terms that may seem just (*f*).

Registrar and office for registration.

554. The registrar for the purpose of registering deeds of arrangement is the registrar of bills of sale (*g*), and the proper office for registration is the Bills of Sale Department of the Central Office of the Supreme Court in London (*h*).

Returns to Board of Trade.

It is the duty of the registrar to make returns of the registration of deeds of arrangement to the Board of Trade for inclusion in the Board's annual parliamentary report (*i*). These returns are made weekly (*k*), and must be signed by the proper officer (*l*), and with reference to each deed included must contain particulars of the date of the deed and its registration; the full name and address of the debtor; a description of his trade; his place or places of business and the title of his firm; the full name and address of each trustee; the nature and effect of the deed and the amount of

(*a*) Deeds of Arrangement Act, 1887 (50 & 51 Vict. c. 57), s. 13 (1); and see Deeds of Arrangement Act Rules, 1888, rr. 7—10.

(*b*) Deeds of Arrangement Act, 1887 (50 & 51 Vict. c. 57), s. 13 (2). Compare *ibid.*, s. 12, and Deeds of Arrangement Act Rules, 1888, rr. 11, 12.

(*c*) Deeds of Arrangement Act, 1887 (50 & 51 Vict. c. 57), s. 11; Deeds of Arrangement Act Rules, 1888, r. 12.

(*d*) Deeds of Arrangement Act, 1887 (50 & 51 Vict. c. 57), ss. 12 (1), 15 (1).

(*e*) *Ibid.*, s. 12 (2), and Deeds of Arrangement Act Rules, 1888, rr. 11, 12.

(*f*) Deeds of Arrangement Act, 1887 (50 & 51 Vict. c. 57), s. 9, and see s. 10. Where the time expires on Sunday, or where the office is closed, the following day is held to be in time.

(*g*) Deeds of Arrangement Act, 1887 (50 & 51 Vict. c. 57), s. 8 (1). See title BILLS OF SALE.

(*h*) *Ibid.*, s. 8 (2). Compare, as to Ireland, the Deeds of Arrangement Amendment Act, 1890 (53 & 54 Vict. c. 24).

(*i*) Bankruptcy Act, 1890 (53 & 54 Vict. c. 71), s. 25 (1), (2) (a).

(*k*) Deeds of Arrangement Rules, 1890, r. 3.

(*l*) *Ibid.*, r. 4. For form of return, see *ibid.*, r. 6.

SECT. 4. Registration of Arrangements.

composition, if any, payable; the gross and net amount of liabilities as shown in the register; the gross and net value of the property as shown in the register; and any further particulars demanded by the Board of Trade from the registrar (*m*).

Registration under other statutes.

555. Where land is included in a deed of arrangement, the deed should also be registered under the Land Charges Registration and Searches Act, 1888, in order that a purchaser thereof may have a good title against a purchaser for value (*n*).

By the Bills of Sale Acts deeds of arrangement are exempted from registration under those Acts (*o*).

SECT. 5.—*Effect of Bankruptcy of Debtor on Arrangement with Creditors.*

When arrangement is act of bankruptcy.

556. If an arrangement by a debtor with his creditors is made by or includes an assignment of substantially the whole of the debtor's property to a trustee, for the benefit of all or some of the debtor's creditors, the assignment operates as an act of bankruptcy committed by the debtor, with the consequence that if the debtor is subsequently adjudged bankrupt on a bankruptcy petition against him, presented before the expiration of three months from the date on which the assignment was executed, the assignment will be void as against the trustee in bankruptcy, and all the debtor's property included in the assignment will belong to the trustee (*p*). The registration of the deed will not protect it from this effect of bankruptcy law, and the fact that the deed has not been stamped in accordance with the law as to registration will not prevent its being relied on as an act of bankruptcy (*q*).

SECT. 6.—*Trustees under Arrangements.*

Position of trustee where bankruptcy supervenes.

557. Until a deed of assignment to a trustee has been executed by or come to the knowledge of the creditors the trustee is an agent only for the debtor under a revocable authority to deal with the estate (*r*). Subsequent bankruptcy of the debtor, before the deed, by assent of the creditor, has become operative to create a binding trust, revokes the trusts of the deed and invalidates them (*s*). And the trustee

(*m*) Deeds of Arrangement Rules, 1890, r. 5.

(*n*) See Land Charges Registration and Searches Act, 1888 (51 & 52 Vict. c. 51), ss. 7—9.

(*o*) See Bills of Sale Act, 1878 (41 & 42 Vict. c. 31), s. 4; Bills of Sale Act (1878) Amendment Act, 1882 (45 & 46 Vict. c. 43), s. 3; *Johnson* v. *Osenton* (1869), 19 L. T. 793, where it was held that a deed intended to operate under the Bankruptcy Acts, which, owing to irregularity, did not do so, was still a good deed, and for the benefit of creditors, and did not come under the Bills of Sale Act. See *General Furnishing and Upholstery Co.* v. *Venn* (1863), 2 H. & C. 153, where the terms of the deed were wide enough to admit all creditors, and it was held to fall outside the Bills of Sale Acts. See further, title BILLS OF SALE.

(*p*) Bankruptcy Act, 1883 (46 & 47 Vict. c. 52), s. 4 (1) (a); *Re Clark, Ex parte Beardmore*, [1894] 2 Q. B. 393, *per* VAUGHAN WILLIAMS, J., at p. 397; *Re Stephenson, Ex parte Official Receiver* (1888), 20 Q. B. D. 540; *Re Pollitt, Ex parte Minor*, [1893] 1 Q. B. 455, *per* Lord ESHER at p. 457.

(*q*) Deeds of Arrangement Act, 1887 (50 & 51 Vict. c. 57), s. 5; *Re Hollinshead, Ex parte Heapy & Son* (1889), 6 Morr. 66.

(*r*) See p. 328, *ante*.

(*s*) See *Smith* v. *Dresser* (1866), L. R. 1 Eq. 651; *Johns* v. *James* (1878), 8 Ch. D.

under a deed of assignment, for three months after its execution, deals with the property comprised thereunder at his peril, because if bankruptcy supervenes the title of the trustee in bankruptcy dates back to the execution of the deed, and the trustee under the deed of assignment is under the circumstances a trustee *de son tort*, and must account fully for what he has received (*t*).

Expenses and charges.

If the deed is void, and the trustee under it has dealt with the property within the three months during which the execution of the deed is available as an act of bankruptcy, then strictly he is not entitled to expenses and charges incurred under the trusteeship (*w*), although it has been held that charges incurred with the *bonâ fide* intention of benefiting creditors may be allowed (*a*), and the trustee in bankruptcy must elect whether he will treat the trustee under the deed as his agent or as a trespasser (*b*). If the estate has benefited by the trustee's administration, the court may allow the trustee under the deed remuneration even where the bankruptcy trustee has refused it (*c*). A trustee under a deed of arrangement is also a "person aggrieved" and entitled to appeal under sect. 104 of the Bankruptcy Act, 1883, where a receiving order has been made against the debtor within three months of the execution of the deed (*d*).

Duties under valid arrangement.

558. When an assignment for the benefit of creditors has become operative and valid, the creditors become the *cestuis que trust*, and the duty of the trustee is to administer the trust estate for their benefit in accordance with the trusts declared in it. His duty is to ascertain all the persons entitled to the benefit of the trusts, and the validity of their claims, and, where the deed provides for the distribution of dividends, to distribute them among all the creditors who are entitled to the benefit of the deed. Questions arising in the administration of the trust estate will under the jurisdiction of the courts over the administration of trusts be determined by the courts on the application either of the trustee or of creditors, and the courts will enforce on the trustee the execution of the trusts, but the law does not provide for any control over a trustee in his management of the trust estate by the Board of Trade or any executive officer, as in the case of a bankruptcy trustee.

744; *Smith* v. *Keating* (1848), 6 C. B. 136; *R.* v. *Humphris*, [1904] 2 K. B. 89, at p. 97; *R.* v. *Creese* (1874), L. R. 2 C. C. R. 105. See *Siggers* v. *Evans* (1855), 5 E. & B. 367, where the trustee was also a beneficiary under the deed, and it was held that assent on his part was not necessary to perfect his title; *Re Waley* (1855), 3 Drew. 165; *Garrard* v. *Lord Lauderdale* (1831), 2 Russ. & M. 451.

(*t*) Compare Bankruptcy Act, 1883 (46 & 47 Vict. c. 52), s. 43, and see *Davis* v. *Petrie*, [1906] 2 K. B. 786, *per* FLETCHER MOULTON, L.J., at p. 790; *Re Mardon*, [1896] 1 Q. B. 140, *per* VAUGHAN WILLIAMS, L.J., at p. 144.

(*w*) *Smith* v. *Dresser* (1866), L. R. 1 Eq. 651.

(*a*) See *Ex parte Shaw* (1846), De G. 242 (even if the benefit does not accrue); *Re Riddeough, Ex parte Vaughan* (1884), 1 Morr. 258, and cases cited, *infra*.

(*b*) *Davis* v. *Petrie, supra; Re Riddeough, Ex parte Vaughan, supra; Re Forster, Ex parte Rawlings* (1887), 4 Morr. 292; *Ex parte Tomlinson, Re Boyce* (1861), 5 L. T. 13. See also pp. 186, 187, *ante*.

(*c*) See *Re Foster, Ex parte Official Receiver* (1895), 72 L. T. 364.

(*d*) *Re Batten, Ex parte Milne* (1889), 6 Morr. 110. See pp. 301 *et seq.*, *ante*, as to appeals.

SECT. 6. Trustees under Arrangements.

Transmission of accounts by trustees to Board of Trade.

559. A trustee under a deed of assignment for the benefit of creditors must once a year transmit to the Board of Trade accounts of his receipts and payments, and the court may enforce any demand of the Board of Trade for such accounts, by committal if necessary (*e*). Similarly the trustee must on demand transmit any amended accounts or any explanation which the Board of Trade may require (*f*).

Form of accounts.

Where the trustee has not since becoming trustee, or since transmitting his last accounts, received or paid out any moneys on account of the estate, he must transmit an affidavit of no receipts or payments (*g*). In his accounts each receipt and payment must be entered so as to explain itself (*h*). Where the trustee carries on a business he must transmit a separate trading account, and only enter the total receipts and payments in his yearly account (*i*). He must enter his petty expenses in sufficient detail to show that no estimated charges are made (*k*); and where property has been realised the gross proceeds must be entered as receipts and the necessary disbursements and charges as payments (*l*). The total amount of any dividend or composition must be entered as one sum, and a separate account forwarded giving particulars, and distinguishing between dividends paid and those unclaimed (*m*). In the case of a partnership, separate accounts must be kept of the joint and separate estates (*n*).

Affidavit verifying final account.

When the final dividend is paid, or the estate realised as far as possible, or the trustee's obligations fulfilled, he must transmit with his accounts an affidavit to that effect, and no further accounts will be required (*o*).

SECT. 7.—*Creditors under Arrangements.*

What creditors entitled to benefit.

560. Where an arrangement is made by a debtor in an instrument which expresses the arrangement to be with his creditors generally, or all creditors who assent to it, any person who is a creditor of the

(*e*) Bankruptcy Act, 1890 (53 & 54 Vict. c. 71), s. 25 (2) (b), making applicable the powers conferred by the Bankruptcy Act, 1883 (46 & 47 Vict. c. 52), s. 102 (5); and see *Re Gallant, Ex parte Board of Trade* (1893), 10 Morr. 128; *Re Rogers, Ex parte Board of Trade* (1887), 4 Morr. 67, where accounts were demanded after removal of the trustee. See *Re Freeman, Ex parte Board of Trade* (1894), 1 Mans. 61, as to trustee's liability for costs where he has caused the Board of Trade to move for his committal. This provision does not extend to receipts and payments prior to January 1, 1891 (*Re Norman, Ex parte Board of Trade*, [1893] 2 Q. B. 369).

(*f*) Bankruptcy Act, 1890 (53 & 54 Vict. c. 71), s. 25; Deeds of Arrangement Rules, 1890, r. 14.

(*g*) Deeds of Arrangement Rules, 1890, r. 15. Even if there are no assets, the trustee must stamp the account (*Re Hertage* (1896), 3 Mans. 397).

(*h*) Bankruptcy Act, 1890 (53 & 54 Vict. c. 71), s. 25; Deeds of Arrangement Rules, 1890, r. 8.

(*i*) Deeds of Arrangement Rules, 1890, r. 9. See also Appendix, Forms, No. 4.

(*k*) Deeds of Arrangement Rules, 1890, r. 10.

(*l*) *Ibid.*, r. 11.

(*m*) *Ibid.*, r. 12. See Appendix, Forms, No. 5.

(*n*) Deeds of Arrangement Rules, 1890, r. 13.

(*o*) *Ibid.*, r. 16. See Appendix, Forms, No. 6.

arranging debtor and who actually, or by his conduct, assents to and elects to take the benefit of the arrangement within the time for accession limited by the instrument, is entitled to share in the benefits of the arrangement, even although the creditor has not signed the deed or agreement (*p*); and in some cases the courts, in exercise of their equitable jurisdiction, will permit a creditor who has not acceded to an arrangement to come in under it and share in its benefits, notwithstanding that the time for accession limited by the instrument has elapsed (*q*).

Creditor taking benefit of arrangement must take no other benefit.

A creditor entitled to the benefit of an arrangement must perform fairly all the conditions of the arrangement which apply to the creditors. If he takes any step which is inconsistent with or opposed to those conditions, as, for instance, by bringing an action against the debtor to recover his debt, he will be liable to be excluded from the benefit of the arrangement (*r*). So too a creditor who makes any underhand or secret bargain with the debtor by which he is to receive some payment or advantage in which the other creditors do not share, will be excluded from all the benefits of the arrangement (*s*).

Assent by creditors.

561. A composition agreement is binding on creditors who execute it or who expressly assent to it, or who by their conduct put themselves in the same situation as if they had executed it. The principle is "that if you put yourself in the situation of having the benefit of a deed you must bear its obligations, although you have not literally executed the deed" (*t*).

When assent not binding.

If a corrupt bargain has been made by the debtor with some of the creditors giving them a secret advantage over the other creditors, the deed will be void and will not be binding on the other creditors so as to preclude them from bringing actions or taking legal proceedings for recovery of the debts due to them (*s*). So if the assent of a creditor has been obtained by misrepresentation he will not be bound by the agreement (*a*). But where the composition agreement provides that the release contained in it is to be void if the instalments are not duly paid, a creditor who has fraudulently obtained a secret advantage over the other creditors will be bound by the agreement, and

(*p*) *Ex parte Jerrard* (1837), 3 Deac. 1, 7; *Re Baber* (1870), L. R. 10 Eq. 554; *Biron* v. *Mount* (1857), 24 Beav. 642.

(*q*) *Watson* v. *Knight* (1854), 19 Beav. 369; *Raworth* v. *Parker* (1855), 2 K. & J. 163; *Johnson* v. *Kershaw* (1847), 1 De G. & Sm. 260; *Brandling* v. *Plummer* (1857), 27 L. J. (CH.) 188; and compare *Biron* v. *Mount*, *supra*, where a creditor was not allowed to come in.

(*r*) *Field* v. *Lord Donoughmore* (1841), 1 Dr. & Wal. 227.

(*s*) *Ilderton* v. *Jewell* (1864), 16 C. B. (N. S.) 142; *Benham* v. *Broadhurst* (1864), 3 H. & C. 472; *Wood* v. *Barker* (1865), L. R. 1 Eq. 139; *Ex parte Milner*, *Re Milner* (1885), 15 Q. B. D. 605; *Dauglish* v. *Tennent* (1865), L. R. 2 Q. B. 49; *Re E. A. B.*, [1902] 1 K. B. 457; and as to consequences of a corrupt bargain, see *Knight* v. *Hunt* (1829), 5 Bing. 432; *Atkinson* v. *Denby* (1861), 6 H. & N. 778.

(*t*) *Forbes* v. *Limond* (1854), 4 De G. M. & G. 298, *per* Lord CRANWORTH, L.C., at p. 315.

(*a*) *Cooling* v. *Noyes* (1795), 6 Term Rep. 263; *Lewis* v. *Jones* (1825), 4 B. & C. 506.

SECT. 7. Creditors under Arrangements.

his debt will be released although default in payment of the instalments has been made by the debtor (*b*).

Where there is no fraud and no inequality among creditors, the court will not interfere to judge of the reasonableness of the arrangement (*c*).

Rights and position of creditors.

562. A creditor may execute a deed of arrangement subsequently to its registration without impairing its validity (*d*), but where creditors have attempted to defeat a deed and have failed they may not claim to come in subsequently and execute it (*e*).

In the event of bankruptcy, creditors who are parties to the deed may prove for their debts (*f*).

Secured creditors need not be included in the schedule to be registered (*g*).

Any creditor is entitled to inspect the trustee's accounts on payment of the prescribed fee (*h*).

Rights against persons liable jointly or as sureties.

563. Frequently the creditors of a debtor hold rights against sureties as security for their debts, or hold securities over parts of the compounding debtor's property. To meet such cases the law provides that if a general release in a composition deed or agreement contains also a reservation of the rights of the creditors against all persons who are liable to them jointly with or as sureties for the debtor, the release has only the qualified operation of a binding obligation not to sue the debtor (*i*), and does not operate to discharge or prejudice the creditors' rights against persons liable to them jointly with the debtor or as sureties for him.

Rights of secured creditors.

So also, if the composition deed or agreement reserves to creditors their rights over securities held by them on the property of the debtor, *e.g.*, by mortgage charge or lien, the terms of a general release contained in the deed or agreement will not prevent the creditors from realising or dealing with and obtaining the benefit of their securities in reduction of the debts due to them (*k*).

Deed must benefit creditors.

564. It is necessary to consider each deed as a whole to see whether it is what it appears to be, namely, a deed for the benefit of the creditors generally or a deed for the benefit of the debtor. If it is the latter, the deed may be declared void as being in fraud of

(*b*) *Ex parte Oliver, Re Hodgson* (1849), 4 De G. & Sm. 354.

(*c*) See *Re Richmond Hill Hotel Co., Ex parte King* (1867), L. R. 4 Eq. 566; *Bailey* v. *Bowen* (1868), L. R. 3 Q. B. 133, 140.

(*d*) See *Re Batten, Ex parte Milne* (1889), 6 Morr. 110.

(*e*) See *Re Meredith* (1885), 33 W. R. 778.

(*f*) See *Re Stephenson, Ex parte Official Receiver* (1888), 20 Q. B. D. 540. It is a question of intention in each case.

(*g*) See *Chaplin* v. *Daly* (1894), 2 Mans. 1. The omission of some creditors' names from the affidavit does not, in the absence of fraud, avoid the registration (*Maskelyne and Cooke* v. *Smith*, [1903] 1 K. B. 671).

(*h*) Bankruptcy Act, 1890 (53 & 54 Vict. c. 71), s. 25 (3).

(*i*) *Kearsley* v. *Cole* (1846), 16 M. & W. 128; *Ex parte Gifford* (1802), 6 Ves. 805; *Bateson* v. *Gosling* (1871), L. R. 7 C. P. 9.

(*k*) *Cullingworth* v. *Loyd* (1840), 2 Beav. 385; *Mawson* v. *Stock* (1801), 6 Ves. 300. For the rules as to rights and duties of secured creditors where the trusts of the deed provide for administration according to the rules of bankruptcy law, see p. 226, *ante*.

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the creditors in spite of being in form a deed for the benefit of creditors (*l*). But actual fraud must be established to avoid a deed on this ground (*m*).

In interpreting a deed of assignment a special limited condition outrides any general implied condition in the deed (*n*), and similarly general words of assignment are controlled by a recital in the deed showing that the assignment was confined to the contents of the schedule only (*o*).

Principles of interpretation.

Where a composition deed has been executed, and default is made in payment of the composition, the Statutes of Limitation run from the date of the default only (*p*).

Statutes of Limitation.

Part III.—The Debtors Acts.

SECT. 1.—*Limited Imprisonment for Debt.*

SUB-SECT. 1.—*General Effect of the Law.*

Punishment of fraudulent debtors.

565. Except in certain cases and classes of cases and in circumstances applicable to them, all of which are expressly or impliedly defined and regulated by statute law, no person can now be arrested or imprisoned for making default in the payment of money (*q*). The intention and effect of the existing law on this subject is that a fraudulent debtor shall be punished, but that an honest debtor shall not (*r*).

SUB-SECT. 2.—*Excepted Cases.*

When defaulting debtor liable to imprisonment.

566. The cases in which default in payment of money renders the defaulter liable to imprisonment are—

(1) Default in paying a penalty, not being a penalty in respect of any contract.

(*l*) See statute 13 Eliz. c. 5. See also *Maskelyne and Cooke* v. *Smith*, [1903] 1 K. B. 671, *per* VAUGHAN WILLIAMS, L.J., at p. 676; and see *Alton* v. *Harrison*, *Poyser* v. *Harrison* (1869), 4 Ch. App. 622; *Evans* v. *Jones* (1864), 3 H. & C. 423; *Spencer* v. *Slater* (1878), 4 Q. B. D. 13; *Boldero* v. *London and Westminster Loan Co.* (1879), 5 Ex. D. 47; and title FRAUDULENT AND VOLUNTARY CONVEYANCES.

(*m*) *Evans* v. *Jones*, *supra*.

(*n*) See *Re Clement*, *Ex parte Goas* (1886), 3 Morr. 153, where the trustee omitted to declare in writing a deed to be void, as he was empowered to do, and it was held that the deed was not void until he did so, and the creditors could not petition in bankruptcy.

(*o*) See *Re Moon*, *Ex parte Dawes* (1886), 55 L. T. 114.

(*p*) See *Re Stock*, *Ex parte Amos* (1896), 3 Mans. 324, following *Irving* v. *Veitch* (1837), 3 M. & W. 90. The law implies a fresh promise by the debtor on the default to pay the original debt.

(*q*) Debtors Act, 1869 (32 & 33 Vict. c. 62), s. 4. See also Debtors Act, 1878 (41 & 42 Vict. c. 54). In the former of these Acts the Statute Law Revision (No. 2) Act, 1893 (56 & 57 Vict. c. 54), has made some repeals. See also title CONTEMPT AND ATTACHMENT.

(*r*) *Marris* v. *Ingram* (1879), 13 Ch. D. 338, *per* JESSEL, M.R., at p. 343, where the origin of the Debtors Act, 1878, is explained. See also *Re Knowles* (1883), 52 L. J. (CH.) 685.

SECT. 1.
Limited Imprisonment for Debt.

(2) Default in paying any sum recoverable summarily before a justice or justices of the peace (*s*).

(3) Default by a trustee or person acting in a fiduciary capacity and ordered by a court to pay a sum in his possession or under his control (*t*).

(4) Default by a solicitor in payment of costs when ordered to pay costs for misconduct, or in payment of money when ordered to pay it as an officer of the court making the order (*t*).

(5) Default in paying for the benefit of creditors any portion of a salary or income under an order of a bankruptcy court. This refers to the provisions by which a bankruptcy court can order part of a bankrupt's salary or income to be paid to his trustee in bankruptcy (*u*).

(6) Default in payment of sums for the payment of which orders for payment of debts due under judgments and orders of court by instalments or otherwise are in the Act (Debtors Act, 1869) authorised to be made (*v*).

Punishment for default.

567. For defaults which are within the above exceptions, the defaulting person is liable to imprisonment for a period not exceeding one year (*w*).

Crown debtors.

568. Debtors to the Crown, such as persons who have given recognisances, are not protected from imprisonment, and in case of default can be committed to prison (*x*).

SUB-SECT. 3.—*Committal for non-payment of Judgment Debts.*

Power of committal.

569. For non-payment of a debt or instalment of a debt due on a judgment or order of a competent court (*y*) the defaulting debtor may, under the conditions hereafter specified, be committed to prison for six weeks at longest unless the order is obeyed earlier (*z*).

Debts in respect of which power exists.

The judgments and orders of court referred to include an order

(*s*) See *Ex parte Edgcombe*, [1902] 2 K. B. 403.

(*t*) The Debtors Act, 1878 (41 & 42 Vict. c. 54), s. 1, gives the court a discretion as to issuing process. See more particularly as to (3) and (4), title CONTEMPT OF COURT.

(*u*) See ss. 89 and 90 of the Bankruptcy Act, 1869 (32 & 33 Vict. c. 71), passed on the same day as the Debtors Act, which were repealed, but substantially reproduced, in the Bankruptcy Act, 1883 (46 & 47 Vict. c. 52), s. 53. See p. 190, *ante*. Hence the meaning of "salary or other income" must be sought in these Bankruptcy Acts.

(*v*) See paras. 569 *et seq.*, *infra*.

(*w*) Debtors Act, 1869 (32 & 33 Vict. c. 62), s. 4. As attachment under the Debtors Acts is a punishment, there is no jurisdiction to make a second order for attachment for the same default (*Church's Trustee* v. *Hibbard*, [1902] 2 Ch. 784). There is no power to commit for non-payment of money in a case not within the exceptions (*Carter* v. *Roberts*, [1903] W. N. 111).

(*x*) *A.-G.* v. *Edmunds* (1870), 22 L. T. 667; *Re A. H. Smith* (1876), 46 L. J. (Q. B.) 73.

(*y*) Debtors Act, 1869 (32 & 33 Vict. c. 62), s. 5.

(*z*) The words are "for a term not exceeding six weeks or until payment of the sum due," which phrase is either compatible with the meaning "or more than six weeks if the order be not obeyed by then" (of course, only up to a year; see s. 4), or "whichever period be the shorter." It is submitted that the latter is the true construction.

for payment of costs (*a*), an order for payment of alimony (*b*), and a memorandum of the compensation awarded under the Workmen's Compensation Act, 1906, when recorded in the manner prescribed by that Act (*c*).

Courts exercising jurisdiction.

570. This power of committal may be exercised by or in respect of an order of any court (*d*); it is, in fact, exercised almost wholly by the High Court and the county courts in respect of judgments of the High Court or of the county courts (*e*).

Inferior courts.

Where a committal order is made by any court other than the High Court (*f*), as, for instance, by a county court or other inferior court, it must (i.) be made by the judge or his deputy, (ii.) be made in open court (*g*), and (iii.) state on its face the ground on which it is made (*h*).

Extent of jurisdiction.

If the judgment debtor is, or resides, within the jurisdiction of a county court, that court may make a committal order in respect of any sum, however large (*i*), and notwithstanding the non-appearance of the debtor (*k*).

Facts to be proved.

571. Before a committal order can be made, it must be proved to the satisfaction of the court that the person to be committed either has or has had since the judgment the means to pay the amount due and has refused or neglected to do so. What is satisfactory proof of means to pay depends on the facts of each case. The burden of proof is generally on the creditor (*l*).

Procedure.

572. The procedure for the purpose of obtaining a committal order is regulated in the county courts and High Court by the rules as to judgment summonses in those courts (*m*).

(*a*) *Hewitson* v. *Sherwin* (1870), L. R. 10 Eq. 53.

(*b*) *Linton* v. *Linton* (1885), 15 Q. B. D. 239; *Re Otway, Ex parte Otway* (1888), 5 Morr. 115.

(*c*) See Workmen's Compensation Act, 1906 (6 Edw. 7, c. 58), Sched. II. (9), and *Bailey* v. *Plant*, [1901] 1 K. B. 31, which refers to the memorandum of compensation under the Workmen's Compensation Act, 1897 (60 & 61 Vict. c. 37), repealed by s. 16 of the Act of 1906.

(*d*) Debtors Act, 1869 (32 & 33 Vict. c. 62), s. 5.

(*e*) Thus, in 1905, 11,427 debtors were imprisoned by county courts, six by the King's Bench Division, and one by the Mayor's Court. See the Civil Judicial Statistics, England and Wales.

(*f*) The powers of which in this behalf may be exercised by the judge in bankruptcy by the Bankruptcy Act, 1883 (46 & 47 Vict. c. 52), s. 103 (1).

(*g*) A room apart from the court will not do, even if the public and reporters are admitted (*Kenyon* v. *Eastwood* (1888), 57 L. J. (Q. B.) 455).

(*h*) *I.e.*, when the order is drawn up; the rule does not apply to the minute of an order to be drawn up hereafter (*Harris* v. *Slater* (1888), 21 Q. B. D. 359). See Debtors Act, 1869 (32 & 33 Vict. c. 62), s. 5 (1).

(*i*) Bankruptcy Act, 1883 (46 & 47 Vict. c. 52), s. 103 (4). Nothing is said as to the debtor who is not or does not reside within the jurisdiction, but as regards county court judgments provision is made for this case by County Court Rules, Ord. 25, r. 26 (2), (3).

(*k*) *Johnstone* v. *Kiernan* (1894), 10 R. 313.

(*l*) An exception is when a county court makes an administration order under the Bankruptcy Act, 1883 (46 & 47 Vict. c. 52), s. 122 (6).

(*m*) County Court Rules, Ord. 25, rr. 25—56, and see pp. 341—343, *post*. The Court of Passage at Liverpool and the Salford Hundred Court issue many judgment summonses (Bankruptcy Rules, r. 361).

SECT. 1. Limited Imprisonment for Debt.

If the debtor appears, he may be examined on oath as to his means; witnesses may also be examined on oath to prove his means (*n*). If means are proved, it is immaterial how the debtor has obtained the means (*o*), and it is sufficient if he has had means of paying only part of the debt (*p*).

Orders made.

573. For the purposes of this provision any court may direct any debt due in pursuance of an order of that or any competent court to be paid by instalments (*q*). In a county court a judgment for a sum not exceeding £20 may be ordered to be paid by instalments (*r*), but on failure to pay any one instalment the power to commit is subject to the conditions above laid down (*s*). Where the judge makes only one order for payment, he can only make one order of commitment (*t*).

Married women.

574. Wherever a *personal* judgment has been rightly (*u*) obtained against a married woman, she is within the Debtors Acts and therefore within the exceptions above stated (*w*); but a married woman cannot be committed to prison on a judgment against her separate estate under the Married Women's Property Act, 1882, for payment of money (*x*), and as it appears that no judgment against a married woman in respect of her contract or tort (*a*) can now be obtained otherwise than in the form of a judgment under the Married Women's Property Act, 1882, it follows that no such judgment can be made the foundation of proceedings against her under the Debtors Acts (*b*).

Effect of committal order.

575. Imprisonment on a committal order does not extinguish the debt or in any way defeat the creditor's rights or remedies (*c*).

(*n*) County Court Rules, Ord. 25, r. 35.

(*o*) *Ex parte Koster, Re Park* (1885), 14 Q. B. D. 597. As to the case of a debtor living on his wife's means, see *Harper* v. *Scrimgeour* (1880), 5 C. P. D. 366; *Chard* v. *Jervis* (1882), 9 Q. B. D. 178.

(*p*) *Ex parte Fryer, Re Fryer* (1886), 17 Q. B. D. 718.

(*q*) Debtors Act, 1869 (32 & 33 Vict. c. 62), s. 5.

(*r*) County Courts Act, 1888 (51 & 52 Vict. c. 43), s. 105.

(*s*) *Horsnail* v. *Bruce* (1873), L. R. 8 C. P. 378.

(*t*) *Evans* v. *Wills* (1875), 1 C. P. D. 229.

(*u*) As to the case where a personal judgment has been wrongfully obtained, see *Re Clara Walter* (1891), 7 T. L. R. 445.

(*w*) *Dillon* v. *Cunningham* (1873), L. R. 8 Exch. 23; and see *Re Turnbull*, [1900] 1 Ch. 180.

(*x*) 45 & 46 Vict. c. 75, s. 1 (2); *Draycott* v. *Harrison* (1886), 17 Q. B. D. 147; *Scott* v. *Morley* (1887), 20 Q. B. D. 120; *Downe* v. *Fletcher* (1888), 21 Q. B. D. 11. Compare *Johnstone* v. *Browne* (1887), 20 L. R. Ir. 443.

(*a*) Even in respect of her antenuptial contract (*Birmingham Excelsior Money Society* v. *Lane*, [1904] 1 K. B. 35); and see County Court Forms, 1903, No. 151 A.

(*b*) "In the case of a married woman there is no remedy upon the judgment . . . by committal to prison" (*Pelton Brothers* v. *Harrison* (No. 2), [1892] 1 Q. B. 118, *per* LOPES, L.J., at p. 120).

(*c*) Debtors Act, 1869 (32 & 33 Vict. c. 62), s. 5.

Limited Imprisonment for Debt.

576. The jurisdiction of the High Court (*d*) is now vested in the judge to whom bankruptcy business is assigned (*e*), and may be exercised by him in court, or sitting in chambers (*f*).

By whom order made.

Applications for leave to issue a summons to commit a judgment debtor to prison may be made *ex parte* and without any affidavit.

Mode of application.

A printed form must be filled up by the applicant, which, if he gives leave, the judge will indorse (*g*).

Evidence of means.

577. When the summons comes on for hearing before the judge of the High Court, the judgment creditor must adduce some evidence that since the judgment the debtor has had means with which he could have paid the judgment debt or the amount of it which he has been ordered to pay. This evidence may be given by an affidavit or by oral examination of witnesses (*h*).

The county court rules for the time being in force as to the committal of judgment debtors apply, with necessary modifications, to all courts exercising jurisdiction under these provisions, including the High Court (*i*).

There is an appeal from the judge's order to the Court of Appeal (*j*).

Mayor's Court.

578. The Mayor's Court of London can commit in respect of its own judgments and those of the High Court (*k*). In respect of the latter and its own above £20, it is limited to cases where the debtor is resident or carrying on business within the city of London (*l*), but where its own judgment is not for more than £20 it is immaterial where the debtor is or resides (*m*).

Issue of judgment summons.

579. A judgment summons in a county court (*n*) may be issued without leave by the county court within the district of which the

(*d*) See R. S. C., Ord. 42, r. 3.

(*e*) Bankruptcy Act, 1883 (46 & 47 Vict. c. 52), s. 103 (1).

(*f*) Before the Bankruptcy Act, 1883, the jurisdiction was exercised by a judge sitting in chambers.

(*g*) Bankruptcy Regulations, 1885, para. 8.

(*h*) *Buckley* v. *Crawford*, [1893] 1 Q. B. 105, at p. 109.

(*i*) Bankruptcy Rules, r. 361.

(*j*) And not to the Divisional Court: *Genese* v. *Lascelles* (1884), 13 Q. B. D. 901; and see *Chard* v. *Jervis* (1882), 9 Q. B. D. 178.

(*k*) Before the Bankruptcy Act, 1883, the jurisdiction was exercised by a judge sitting in chambers.

(*l*) *Washer* v. *Elliott* (1876), 1 C. P. D. 169.

(*m*) *Schuller* v. *Wood* (1894), 64 L. J. (Q. B.) 243. The procedure is governed by rules made under s. 10 of the Mayor's Court of London Procedure Act, 1857 (20 & 21 Vict. c. 157). The judgment summons must be served personally, but where the court is satisfied that the debtor evades service or that the summons has come to his knowledge, it may proceed as if personal service had been effected. Evidence of service and of means to pay may be given orally or on affidavit. Where the judgment debtor does not appear an order for payment of judgment and costs must be served on him or sent by post. Notice of the order of committal must be given to the debtor if he has not appeared. A warrant of committal will not be issued after the expiration of six months from the date of the order except by leave of the court. The warrant remains in force for six months unless renewed by leave of the court. Rules similar to those in force in the county court provide for cases where payment of the debt is made or where the judgment debtor is bankrupt. For forms, see Glyn and Jackson's Mayor's Court Practice. See generally title COURTS.

(*n*) This process is regulated by the County Court Rules, 1903—1907, Ord. 25, rr. 25—56.

SECT. 1. **Limited Imprisonment for Debt.**

debtor summoned resides, or carries on business, or is employed (*o*). Where the debtor does not reside, and neither carries on business nor is employed, within the district of the court in which the judgment or order was obtained, leave to issue the summons must be obtained from the judge. The application must be supported by an affidavit, and it must contain a clear *primâ facie* case (*p*) for commitment. For this purpose the metropolitan districts of London are one district (*q*).

But even where the debtor is out of the district in the sense just explained, no leave for the issue of a judgment summons need be obtained if his travelling expenses to and from the hearing of the summons are paid beforehand (*r*).

Court issuing.

The summons may issue from a court in which the judgment was not obtained (*s*). It must be in the prescribed form (*a*), and must not include the costs of an attempted execution (*b*).

Service.

580. A judgment summons must be served personally (*c*). It must issue within four months after the last payment or after the date of default of payment, unless the delay is due to an attempt to levy execution on the debtor's goods, or unless an affidavit is made in proof of the latter's means to the satisfaction, in the first instance, of the registrar. If the facts set out in the affidavit do not satisfy the registrar, he must refuse to issue the summons and refer the matter to the judge. But no affidavit is required if the debtor's travelling expenses are paid beforehand as explained above (*d*).

Evading service.

The summons must be issued not less than ten clear days before the hearing; but where there is good reason to believe that the debtor is evading service or likely to abscond, it may be issued and served at any time. Only on proof that the debtor is evading service or likely to abscond may the judge hear the summons in the absence of the debtor (*e*); if the summons is served in the ordinary way, and the debtor does not attend the hearing, he may be committed in his absence upon proof of means.

Evidence by affidavit.

581. Either the creditor or the debtor, if not residing within the district of the court hearing the summons, may send an affidavit to the court, which the judge may, if he thinks fit, admit as evidence (*f*).

(*o*) County Court Rules, 1903—1907, Ord. 25, r. 26 (1).

(*p*) *E.g.*, it may be material whether the debtor has children to keep or not (*McIntosh* v. *Simpkins*, [1901] 1 K. B. 487), whether his business is profitable or not (*ibid.*); and the source of the applicant's information must be stated (*Lumley* v. *Osborne*, [1901] 1 K. B. 532).

(*q*) County Court Rules, 1903—1907, Ord. 25, r. 26 (2).

(*r*) Ord. 25, r. 26 (3). The amount is fixed by the registrar.

(*s*) Ord. 25, r. 29.

(*a*) Ord. 25, r. 31, and Appendix to County Court Rules, Forms, Nos. 178, 181, and 184.

(*b*) Ord. 25, r. 56.

(*c*) Ord. 25, r. 25 (1). As to neglect to serve a summons, see *Turley* v. *Daw* (1906), 22 T. L. R. 281.

(*d*) Ord. 25, r. 28.

(*e*) Ord. 25, r. 32.

(*f*) Ord. 25, r. 37.

Transfer of proceedings.

582. If, where the process is transferred from one court to another, no order is made, the cause remains in the former court, but if any order is made, in the latter (*g*).

When no order can be made.

583. If upon the hearing the debtor satisfies the judge that a receiving order has been made against him, or that he has been adjudicated bankrupt, and that the debt was provable in bankruptcy, no order for commitment can be made (*h*); and if it has been made, and he makes an affidavit that any of these events has happened, it cannot be enforced, and if he has been arrested, he must be released (*i*).

If upon the hearing the debtor satisfies the judge that an order for the administration of his estate has been made in a county court (*k*), and that the debt in respect of which the summons issued has been notified to the court in which such order was made, no order of commitment can be made unless the creditor has obtained leave of the court which granted the administration order (*l*), and if the order of commitment has been made, and the debtor makes an affidavit that an administration order has been made and the debt duly notified, and that no leave has been granted to the creditor to proceed, it cannot be enforced, and if the debtor has been arrested he must be released (*m*).

Where a composition has been agreed upon between a debtor and his creditors, the statutory remedy of imprisonment is suspended, and if the composition is carried out no order for committal in respect of a debt due at the date of the composition can be made, but if the composition is not carried out the debt and remedies therefor revive (*n*).

Effect of order.

584. If the order of commitment is made, its execution may be suspended (*o*). An order cannot, however, be made for payment by instalments, and that the debtor be committed in default of payment of any (future) instalments (*p*). It cannot if executed remain in force for more than a year, but if unexecuted the judge may, before it lapses, extend its duration for not more than a year (*q*). The debtor may not be imprisoned a second time for non-payment of a sum in respect of which he has already been imprisoned (*r*).

(*g*) County Court Rules, 1903—1907, Ord. 25, r. 40 (2), (3).

(*h*) Ord. 25, r. 42 A. If the debt was not provable in bankruptcy (*e.g.*, future payments of alimony), the order may be made, although the debtor has been adjudicated bankrupt (*Kerr* v. *Kerr*, [1897] 2 Q. B. 439; *Linton* v. *Linton* (1885), 15 Q. B. D. 239).

(*i*) Ord. 25, rr. 43 A, 44 A; *Re Nuthall*, [1891] W. N. 55, 64 L. T. 241.

(*k*) Under s. 122 of the Bankruptcy Act, 1883 (46 & 47 Vict. c. 52), commitment under which is expressly excepted from this rule (see *Re Ryley, Ex parte Official Receiver* (1885), 15 Q. B. D. 329).

(*l*) Ord. 25, r. 45 A.

(*m*) Ord. 25, rr. 45 B, 45 C.

(*n*) *Newell* v. *Van Praagh* (1874), L. R. 9 C. P. 96.

(*o*) Ord. 25, rr. 46 (2), 47. See *Stonor* v. *Fowle* (1887), 13 App. Cas. 20.

(*p*) *R.* v. *Judge of Brompton County Court and Reeves* (1886), 18 Q. B. D. 213; *Re the Debtors Act*, 1869 (1870), 22 L. T. 666.

(*q*) Ord. 25, r. 46 (4).

(*r*) Ord. 25, r. 55; *Evans* v. *Wills* (1876), 1 C. P D. 229.

SECT. 1. Limited Imprisonment for Debt.

585. At any time between commitment and actual custody the debtor may obtain his release by paying the bailiff the amount indorsed on the order (*s*).

Release.

If he is actually in custody, by paying to the gaoler the amount indorsed on the order of commitment the debtor may obtain his release at once, or, if the amount is paid into court, he can be released as soon as the gaoler can be informed of the payment (*t*).

The creditor can procure the debtor's release by a request in writing to the registrar (*a*).

Costs.

586. If the creditor does not appear on the hearing, the debtor, if he appears, may be awarded the costs which he has incurred (*b*).

Speaking generally, the successful creditor can obtain the costs of the hearing; but if, on the hearing of the summons, no order of commitment is made, the creditor is not to have costs unless the judge is satisfied that since that judgment the debtor has had means to pay the sum in default (*c*).

Appeal.

587. There is (probably) an appeal against an order of commitment (*d*), though not, perhaps, on a ground of fact (*e*). A writ of prohibition to an inferior court would be granted, if a committal order was made in a case in which the court had not jurisdiction to make it (*f*).

SUB-SECT. 5.—*Receiving Order in lieu of Committal.*

When receiving order may be made.

588. Upon the application to commit a judgment debtor the court, if it have bankruptcy jurisdiction, may *instead* make a receiving order (1) with the consent of the creditor, and (2) on his paying the prescribed fee (including deposit). If a receiving order is made, the debtor thereby is deemed to have committed an act of bankruptcy (*g*). There must be evidence of means before the court (*h*).

Debtor a foreigner.

When this jurisdiction arises the receiving order may be made even though the debtor is a foreigner not domiciled in England who has not ordinarily resided or had a dwelling-house or place of

(*s*) County Court Rules, 1903—1907, Ord. 25, rr. 48, 48 A (4).

(*t*) Ord. 25, rr. 49, 49 A.

(*a*) Ord. 25, r. 50.

(*b*) Ord. 25, r. 52.

(*c*) Ord. 25, rr. 45 E, 46 B, 54.

(*d*) Under s. 120 of the County Courts Act, 1888 (51 & 52 Vict. c. 43), as is submitted in the Yearly County Court Practice, 1908, p. 455.

(*e*) *Esdaile* v. *Visser* (1880), 13 Ch. D. 421.

(*f*) See titles COUNTY COURTS, and CROWN PRACTICE; *Evans* v. *Wills* (1876), 1 C. P. D. 229; *Pitcher* v. *Bourn* (1894), 10 T. L. R. 245.

(*g*) Bankruptcy Act, 1883 (46 & 47 Vict. c. 52), s. 103 (5); Bankruptcy Rules, r. 357.

(*h*) *Re Clark*, [1898] 1 Q.B. 20; *Re a Debtor, Ex parte W. A. Baker, Ltd.* (1904), 48 Sol. Jo. 688; *Re a Debtor, Ex parte the Debtor*, [1905] 1 K. B. 374. But the absence of such evidence was held to be immaterial where the debtor had made an assignment of the whole of his property on the morning of the day when the judgment was given against him (*R.* v. *Sussex County Court Judge* (1888), 59 L. T. 32).

business in England within a year (*i*), and, consequently, no bankruptcy petition could be presented against him (*k*).

If the court has no bankruptcy jurisdiction, or none in the given case, but thinks a receiving order ought to be made instead of committing, it can transfer the case to the court which has power to make the receiving order (*l*).

Summary administration.

589. Where a judgment has been obtained in a county court, and the debtor is unable to pay the amount of it forthwith, and alleges that his total liabilities do not amount to more than £50, the county court may, instead of committing the debtor to prison, make an order for the administration of his estate and for the payment of his debts by instalments or otherwise and either in full or to such extent as the court thinks practicable (*m*).

Suspension of other remedies.

After the order has been made and during its currency, no creditor, existing or future, can have any remedy against the person or property of the debtor without leave of the county court (*n*).

Default by debtor.

A debtor making default in payment of an instalment due under the order will, unless the contrary is proved, be deemed to have had since the date of the order the means to pay the amount in which default has been made and to have refused or neglected to pay it, and may be committed to prison (*o*).

SECT. 2.—*Fraudulent Debtors.*

SUB-SECT. 1.—*Criminal Offences.*

Misdemeanours on part of bankrupt.

590. The following offences on the part of a bankrupt, or a person against whom a receiving order has been made (*p*), are misdemeanours (*q*), punishable by a term of imprisonment not exceeding two (*r*) years with or without hard labour:—

(1) Failure to disclose property.

Not fully discovering to the trustee in bankruptcy all the estate in his possession and all that he has disposed of (*s*), and how and to whom and for what consideration he disposed of it, except what has been disposed of in the ordinary way of trade (*t*)

(*i*) As in *Re Clark*, [1898] 1 Q. B. 20.

(*k*) Bankruptcy Act, 1883 (46 & 47 Vict. c. 52), s. 6 (1) (d).

(*l*) Bankruptcy Rules, rr. 359, 360; Bankruptcy Act, 1883 (46 & 47 Vict. c. 52), s. 103.

(*m*) Bankruptcy Act, 1883 (46 & 47 Vict. c. 52), s. 122 (1); Bankruptcy Rules, r. 358. For the provisions and procedure regarding administration orders, see pp. 294 *et seq.*, *ante*. For the Bankruptcy (Administration Order) Rules, 1902, under this section (122), see Yearly County Court Practice, 1908, p. 461, and Chalmers and Hough, Bankruptcy Acts, 6th ed., p. 653.

(*n*) Bankruptcy Act, 1883 (46 & 47 Vict. c. 52), s. 122 (5); *Pearson* v. *Wilcock*, [1906] 2 K. B. 440.

(*o*) Bankruptcy Act, 1883 (46 & 47 Vict. c. 52), s. 122 (6).

(*p*) *Ibid.*, s. 163 (2).

(*q*) Debtors Act, 1869 (32 & 33 Vict. c. 62) s. 11. The enumeration above follows the sub-sections of s. 11; *e.g.*, (1) is taken from sub-s. 1.

(*r*) Compare *ibid.*, s. 13, p. 350, *post*.

(*s*) This is clearly the meaning of the words in sub-s. 1, though an indictment framed on substantially the same words (in 5 & 6 Vict. c. 122, s. 32, repealed) was quashed on the ground that the debtor could not at the same time have in his possession and have disposed of the same property (*R.* v. *Harris* (1849), 1 Den. 461).

(*t*) See note (*p*), p. 349, *post*.

SECT. 2. **Fraudulent Debtors.**

or in the ordinary course of family life. But if, in any case, the jury is satisfied that the bankrupt had no intent to defraud, there is no offence (*a*).

The disclosure is not restricted to property still in the debtor's possession at the commencement of the bankruptcy (*b*), though how far back the disclosure is to go is not definitely laid down, probably as far back as the date at which fraud is alleged (*c*).

It is for the prisoner to rebut the presumption of fraud (*d*). The non-disclosure proved must be criminal (*e*). He is clearly entitled to give evidence of any disclosure made by him to his creditors before bankruptcy, for the jury may infer from this an innocent intention (*f*).

If there has been a disclosure in writing it must be produced in order to convict the prisoner of incomplete disclosure (*g*).

(2) Failure to deliver up property.

Failing to deliver up to the trustee, or as he directs, all the property in the debtor's custody or control that he is legally bound to give up. But, if the jury is satisfied that he had no intent to defraud, this is not an offence (*h*).

(3) Failure to deliver up documents.

Failure as in the last case, and with the same proviso, with reference to documents (*i*).

(4) Concealment of property.

Concealment by the debtor after the presentation of a bankruptcy petition by or against him (*k*), or within four months before such presentation or before the date of a receiving order made against him upon a judgment summons (*l*), of any part of his property to the value of £10, or of any debt due to or from him, unless the jury is satisfied that he had no intent to defraud (*m*).

It is enough to convict him if he is privy to the concealment by someone else, nor need the goods have actually come into his hands (*n*).

(*a*) See *R.* v. *Dyson*, [1894] 2 Q. B. 176, in note (*t*), p. 351, *post*.

(*b*) *R.* v. *Michell* (1880), 50 L. J. (M. C.) 76.

(*c*) *Semble*, *per* Lord COLERIDGE, C.J., in *R.* v. *Michell*, *supra*, at p. 77.

(*d*) *R.* v. *Thomas* (1870), 11 Cox, C. C. 535; *R.* v. *Bolus* (1870), 11 Cox, C. C. 610; *R.* v. *Cherry* (1871), 12 Cox, C. C. 32.

(*e*) Thus where there was a conviction for not "truly disclosing and discovering" (under 5 Geo. 2, c. 30, repealed by 6 Geo. 4 c. 16, s. 1), but the debtor had appeared before the commissioners and had sworn that his refusal to reveal a certain part of his property was not in order to defraud his creditors, but because, under legal advice, he disputed the validity of the commission, the conviction was held wrong (*R.* v. *Page* (1819), Russ. & Ry. 392).

(*f*) *R.* v. *Wiseman* (1901), 20 Cox, C. C. 144 (indictment under sub-ss. 1, 2, 4, 6).

(*g*) *R.* v. *Evani* (1825), 1 Mood. C. C. 70. This was under 6 Geo. 4, c. 16, s. 112, repealed by 12 & 13 Vict. c. 106, s. 1. But it does not appear that secondary evidence could not in a proper case be given of the writing, for in that case no search had been made for the lost document, nor was it proved that it was lost.

(*h*) Debtors Act, 1869 (32 & 33 Vict. c. 62), s. 11 (2).

(*i*) *Ibid.*, s. 11 (3).

(*k*) *Ibid.*, s. 11 (4), as amended by s. 163 (1) of the Bankruptcy Act, 1883 (46 & 47 Vict. c. 52), and s. 26 of the Bankruptcy Act, 1890 (53 & 54 Vict. c. 71).

(*l*) Sect. 26 of Bankruptcy Act, 1890.

(*m*) See note (*d*), *supra*.

(*n*) *R.* v. *Evani*, *supra*.

The concealment must be wilful. Any secreting is enough, though a full disclosure be made later (*o*).

It is doubtful whether embezzling sums less than £10 at different times, but on the whole amounting to more, is within this particular provision (*p*).

(5) Fraudulent removal of property.

Fraudulent removal by the debtor after the presentation of a bankruptcy petition by or against him, or within four months before such presentation or before the date of a receiving order made against him, of any part of his property of the value of £10 (*q*).

The fact that the trustee may have recovered the removed property does not in any way affect the criminal liability of the debtor (*r*).

The property removed must be proved to be the debtor's property (*s*).

(6) Material omissions.

Any material omission by the debtor in any statement relating to his affairs, unless the jury is satisfied that he had no intent to defraud (*t*).

(7) Failure to inform as to false debt.

Failing for a month (*u*) to inform the trustee that a false debt which he knows or believes to be false has been proved in the debtor's bankruptcy (*v*).

(8) Preventing production of books etc.

Preventing, after the presentation of a bankruptcy petition by or against the debtor, any book, document etc., relating to his affairs being produced, unless the jury is satisfied that he had no intent to conceal the state of his affairs or to defeat the law (*w*).

(9) Concealment etc. of books.

Concealment, destruction, mutilation, or falsification of any book or document relating to his affairs or being privy thereto by the debtor after the presentation of a bankruptcy petition by or

(*o*) *Courtivron* v. *Meunier* (1851), 6 Exch. 74, under 5 & 6 Vict. c. 122 (repealed), s. 32.

(*p*) *R.* v. *Davison and Gordon* (1855), 7 Cox, C. C. 158, *per* ALDERSON, B., at p. 161.

(*q*) Debtors Act, 1869 (32 & 33 Vict. c. 62), s. 11 (5), as amended by s. 163 (1) of the Bankruptcy Act, 1883 (46 & 47 Vict. c. 52). See as to indictment p. 353, *post*.

(*r*) *Re Ward, Ex parte Monkhouse* (1879), 40 L. T. 296.

(*s*) A prisoner executed an assignment of his property to trustees for the benefit of his creditors, but the assignment was not registered as a bill of sale. He remained in possession as the bailiff of the trustees, but afterwards fraudulently removed stock to the value of more than £10. He then made an arrangement as to his affairs, and a trustee was appointed. It was held that a prosecution under this sub-section must fail, because, though the assignment, being unregistered, was void as against the new trustee, yet it was otherwise in force, and hence the property removed was not the prisoner's, but the first trustee's, at the time of the fraudulent removal (*R.* v. *Creese* (1874), L. R. 2 C. C. R. 105). But where a trustee under an assignment never received moneys kept back from him by an absconding debtor, it was held that the moneys were the debtor's property, and he could be convicted for an offence under s. 12 (*R.* v. *Humphris*, [1904] 2 K. B. 89).

(*t*) Debtors Act, 1869 (32 & 33 Vict. c. 62), s. 11 (6). See note (*d*), p. 346, *ante*.

(*u*) *I.e.*, after the trustee's appointment, the date of which is conclusively fixed by the certificate of the Board of Trade (Bankruptcy Act, 1883 (46 & 47 Vict. c. 52), s. 138). See also *R.* v. *Beaumont* (1872), 26 L. T. 587. See note (*b*), p. 351, *post*.

(*v*) Debtors Act, 1869 (32 & 33 Vict. c. 62), s. 11 (7).

(*w*) *Ibid.*, s. 11 (8), as amended by s. 163 (1) of the Bankruptcy Act, 1883 (46 & 47 Vict. c. 52).

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against him or within four months before such presentation (*a*), or before the date of a receiving order on a judgment summons (*b*), unless the jury is satisfied that he had no intent to conceal the state of his affairs or to defeat the law (*c*).

(10) Falsification of entries.

Substantially the same offence as the last as to false entries by the debtor or with his privity (*d*).

A distinction has been drawn between *deceiving* and *defrauding*: there may be deceit without the creditors being cheated out of anything, which is what, perhaps, "defraud" implies (*e*).

(11) Fraudulent alterations etc. of documents.

Fraudulently parting with, altering, or making any omission in any document relating to his affairs or being privy thereto after the presentation of a bankruptcy petition by or against him or within four months before such presentation (*f*), or before the date of a receiving order made against him on a judgment summons (*g*).

(12) Fictitious losses.

Attempting after the presentation of a bankruptcy petition by or against him, or at any meeting of his creditors within four months before such presentation (*h*) or before the date of a receiving order made against him on a judgment summons (*i*), to account for any part of his property by fictitious losses or expenses.

(13) Obtaining property on credit.

Fraudulently obtaining within four months before the presentation of a bankruptcy petition by or against him, or before the date of a receiving order made against him, any property on credit, and not paying for it (*k*).

Obtaining goods on approval is not an obtaining of credit (*l*). The goods must have been obtained by the false representation charged, and not any other (*m*). It is sufficient that the goods have

(*a*) Debtors Act, 1869 (32 & 33 Vict. c. 62), s. 11 (9), as amended by s. 163 (1) of the Bankruptcy Act, 1883 (46 & 47 Vict. c. 52), and s. 26 of the Bankruptcy Act, 1890 (53 & 54 Vict. c. 71).

(*b*) Bankruptcy Act, 1890 (53 & 54 Vict. c. 71), s. 26.

(*c*) *R.* v. *Beck* (1889), 16 Cox, C. C. 718.

(*d*) Debtors Act, 1869 (32 & 33 Vict. c. 62), s. 11 (10).

(*e*) *R.* v. *Ingham* (1859), 8 Cox, C. C. 240, where the jury found that prisoner had made false entries under s. 252 of the Bankrupt Law Consolidation Act, 1849 (12 & 13 Vict. c. 106, repealed), with intent to deceive his creditors as to the true state of his accounts, and especially to prevent his having to account for a deficiency which appeared in the genuine account, but not in any way to defraud them of any money or property. Apparently he was anxious not to disclose a particular mode of expenditure. The court quashed a conviction.

(*f*) Debtors Act, 1869 (32 & 33 Vict. c. 62), s. 11 (11), as amended by s. 163 (1) of the Bankruptcy Act, 1883 (46 & 47 Vict. c. 52), and s. 26 of the Bankruptcy Act, 1890 (53 & 54 Vict. c. 71).

(*g*) Bankruptcy Act, 1890 (53 & 54 Vict. c. 71), s. 26.

(*h*) Debtors Act, 1869 (32 & 33 Vict. c. 62), s. 11 (12), as amended by s. 163 (1) of the Bankruptcy Act, 1883 (46 & 47 Vict. c. 52), and s. 26 of the Bankruptcy Act, 1890 (53 & 54 Vict. c. 71).

(*i*) Bankruptcy Act, 1890 (53 & 54 Vict. c. 71), s. 26.

(*k*) Debtors Act, 1869 (32 & 33 Vict. c. 62), s. 11 (13), as amended by s. 26 of the Bankruptcy Act, 1890, passed in view of *Re Burden, Ex parte Wood* (1888), 21 Q. B. D. 24.

(*l*) *R.* v. *Lyons* (1863), 9 Cox, C. C. 299, under 24 & 25 Vict. c. 134, s. 221, repealed.

(*m*) An insolvent trader bought goods on credit, shipped them to Australia, and raised money by pledging the bills of lading. As there was no evidence that he had obtained the goods by any false representation, it was held he could not be convicted under the Debtors Act, 1869 (32 & 33 Vict. c. 62), s. 11 (13), (14),

been obtained within the jurisdiction of the court, though the false representation was made elsewhere (*n*).

(14) Obtaining credit in ordinary course of business

Within four months before the presentation of a bankruptcy petition by or against him, or before the date of a receiving order made against him on a judgment summons, obtaining property on credit (*o*) under the false pretence of dealing in the ordinary way of his business, and failing to pay for the property, unless the jury negatives the intent to defraud (*p*).

(15) Pledging etc. property obtained on credit.

A similar offence to the last as to a person who pledges such property or disposes of it otherwise than in the ordinary course of his business (*q*).

(16) Procuring creditor's consent by fraud.

Making any false representation or committing any other fraud in order to get the consent of any creditor to any agreement with reference to his affairs or bankruptcy (*r*).

Felonies on part of bankrupt.

591. It is a felony for any bankrupt (*s*) after the presentation of a bankruptcy petition by or against him (*t*) or within four months before such presentation (*a*) to leave, or attempt or prepare to leave, England and take with him any of his property to the value of £20 which ought by law to be divided among his creditors, unless the jury is satisfied that he had no intent to defraud (*b*); the maximum punishment for the above offences is two years' imprisonment with or without hard labour.

An infant cannot be convicted of this felony if at the time of absconding he was liable only for trade debts (*c*).

Misdemeanours on part of any person.

592. The following offences are also (*d*) misdemeanours, by whomsoever committed (*i.e.*, not only by the insolvent debtor (*e*)), and the

or (15) (*Ex parte Brett, Re Hodgson* (1875), 1 Ch. D. 151). As to obtaining goods in exchange for a cheque, falsely representing that it will be honoured, see *R.* v. *Cosnett* (1901), 84 L. T. 800.

(*n*) *R.* v. *Ellis*, [1899] 1 Q. B. 230.

(*o*) *Ibid.*

(*p*) Debtors Act, 1869 (32 & 33 Vict. c. 62), s. 11 (14), as amended by s. 26 of the Bankruptcy Act, 1890 (53 & 54 Vict. c. 71). See note (*d*), p. 346, *ante*.

(*q*) The words "otherwise than" etc. govern pledges as well as other disposals of such property (*R.* v. *Juston* (1897), 61 J. P. 505). See also notes (*m*) and (*n*), *supra*. It has been held not to be in the ordinary course of a grocer's business to dispose of his goods by bill of sale (*R.* v. *Thomas* (1870), 22 L. T. 138).

(*r*) Debtors Act, 1869 (32 & 33 Vict. c. 62), s. 11 (16).

(*s*) Which includes a person against whom a receiving order has been made (Bankruptcy Act, 1883 (46 & 47 Vict. c. 52), s. 163 (2)).

(*t*) Debtors Act, 1869 (32 & 33 Vict. c. 62), s. 12, as amended by s. 163 (1) of the Bankruptcy Act, 1883 (46 & 47 Vict. c. 52). See pp. 34, 46, *ante*.

(*a*) No offence appears to be committed where a bankrupt leaves England etc. within four months before presentation of a petition *by* him, or before the date of a receiving order being made against him, s. 26 of the Bankruptcy Act, 1890 (53 & 54 Vict. c. 71), having no application.

(*b*) See note (*t*), p. 351, *post*.

(*c*) *R.* v. *Wilson* (1879), 5 Q. B. D. 28, where prisoner was an infant when he quitted England, and when he was adjudicated bankrupt. His conviction was quashed in view of s. 1 of the Infants' Relief Act, 1874 (37 & 38 Vict. c. 62).

(*d*) Like those enumerated pp. 345 *et seq.*, *ante*.

(*e*) *R.* v. *Rowlands* (1882), 8 Q. B. D. 530.

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maximum punishment for them is one year's imprisonment with or without hard labour (*f*).

(1) Obtaining credit by fraud.

Obtaining credit (*g*) in incurring a debt or liability by means of false pretences or any fraud (*h*).

The credit may be for the shortest period, even that of handing goods across a counter, if there be fraud (*i*); but obtaining goods by payment of a worthless cheque and the false representation that such cheque will be honoured is not obtaining "credit" by false pretences (*k*).

(2) Making any gift etc. with intent to defraud.

Making or causing to be made any gift, delivery, or transfer of, or any charge upon, property with intent to defraud creditors.

A debtor does not commit this offence by selling part of his goods below their value, though his creditors may thereby be prejudiced (*l*).

The person intended to be defrauded must be an actual creditor at the time of the conveyance etc., not only a possible creditor (*m*). A person who has brought an action against the debtor for unliquidated damages, but has not obtained judgment, is not a creditor (*m*).

(3) Concealment of property with intent to defraud.

Concealing or removing by anyone of any part of his property after or within two months before the date of any unsatisfied judgment or order made against him for the payment of money, with intent to defraud his creditors (*n*).

The intention proved must be to defraud all the creditors generally, though, perhaps, this may be done by showing that there was only one, or that the fraud practised on one was intended to be tried on all (*n*).

Undischarged bankrupt obtaining credit above £20.

It will be noted that the maximum term of punishment is less than that provided for the offences on the part of a bankrupt or person against whom a receiving order has been made above mentioned (*o*). Hence when an undischarged bankrupt obtains credit to the value of more than £20 from any one person without revealing that he is undischarged (*p*), his offence, which may be dealt with as

(*f*) Debtors Act, 1869 (32 & 33 Vict. c. 62), s. 13.

(*g*) See note (*l*), p. 348, *ante*.

(*h*) See, as to the wording here, note (*c*), p. 353, *post*.

(*i*) *E.g.*, where a man goes into a restaurant and orders food etc.—whence an intention to pay is universally inferred—but has no means of paying for it, he may be convicted under this sub-section (*R.* v. *Jones*, [1898] 1 Q. B. 119).

(*k*) *R.* v. *Cosnett* (1899), 20 Cox, C. C. 6.

(*l*) *Re Cranston, Ex parte Cranston* (1892), 9 Morr. 160.

(*m*) Thus where a defendant who, in view of a pending action for breach of promise of marriage in which judgment was ultimately, some four weeks after the transfer, recovered against him, gave a bill of sale over his property, was convicted under this sub-section, the conviction was quashed on the ground that the judgment creditor did not become so till judgment was signed (*R.* v. *Hopkins*, [1896] 1 Q. B. 652).

(*n*) Compare p. 346, *ante*. In *R.* v. *Rowlands* (1882), 8 Q. B. D. 530, the debtor, not a bankrupt, had undoubtedly endeavoured to defeat a judgment creditor, and had been convicted under this sub-section, but as the indictment charged an intent to defraud "creditors," and there was no evidence that there were other creditors, the conviction was quashed. But it seems that the jury might, if correctly directed, have found the intent to defraud generally.

(*o*) See note (*r*), p. 345, *ante*.

(*p*) Bankruptcy Act, 1883 (46 & 47 Vict. c. 52), s. 31. See p. 268, *ante*.

an offence under the Debtors Act (*q*), is analogous rather to those here dealt with than to those above mentioned (*r*), and the punishment ought to be on the more lenient scale. In this particular case there is no need that there should be an express contract to give credit; the offence is complete if, in fact, credit is obtained (*s*). And in this offence an intent to defraud is not a material ingredient (*t*). The question is not whether the bankrupt ordered goods to the value of £20, but whether, in fact, he kept or got goods to that value (*a*).

False claim etc. by creditor.

593. Any creditor in a bankruptcy who makes a false claim, or a proof, declaration, or statement of account which is untrue in any material particular with a view to defraud commits a misdemeanour for which he is liable to (at most) a year's imprisonment with or without hard labour (*b*).

Effect of composition on debts incurred by fraud.

594. If a debtor makes a statutory composition or arrangement with his creditors which they accept and the court approves, he remains liable for the unpaid balance of any debt incurred or increased, or for which forbearance was obtained, by fraud, unless the defrauded creditor assented to the composition or arrangement otherwise than by receiving dividends (*c*).

The court of bankruptcy has no jurisdiction to interfere with any creditor bringing an action for the unpaid balance (*d*).

Taking an active part in procuring the composition was held to be evidence of "assent" (*e*).

Criminal liability after discharge or composition.

595. Neither a discharge in bankruptcy, nor a composition or scheme of arrangement accepted or approved, exempts a debtor who has been guilty of a criminal offence from prosecution (*f*).

SUB-SECT. 2.—*Prosecution.*

When prosecution ordered.

596. Upon a report by the official receiver (*g*) or the trustee in bankruptcy, or if the court is satisfied upon the representation of any

(*q*) Bankruptcy Act, 1883 (46 & 47 Vict. c. 52), s. 31.

(*r*) Debtors Act, 1869 (32 & 33 Vict. c. 62), s. 11, p. 345, *ante*; *R.* v. *Turner* (1903), 20 Cox, C. C. 590.

(*s*) *R.* v. *Peters* (1886), 16 Q. B. D. 636.

(*t*) *R.* v. *Dyson*, [1894] 2 Q. B. 176, where HAWKINS, J., at p. 179, pointed out that the presence of words necessitating an intent to defraud in ss. 11 and 12 of the Debtors Act, 1869 (pp. 345 *et seq.*, *ante*), and the absence of them here (Bankruptcy Act, 1883 (46 & 47 Vict. c. 52), s. 31) are not accidental, and effect must be given to each.

(*a*) *R.* v. *Juby* (1886), 55 L. T. 788, where the prisoner, having value under £20 (which he had not ordered), ordered more goods, bringing the aggregate debt over that sum.

(*b*) Debtors Act, 1869 (32 & 33 Vict. c. 62), s. 14.

(*c*) Bankruptcy Act, 1883 (46 & 47 Vict. c. 52), s. 19, which, by virtue of s. 149 (2) of that Act, practically replaces s. 15 of the Debtors Act, 1869, as the latter only refers to the Bankruptcy Act, 1869, now repealed.

(*d*) *Re Jacobs, Ex parte Halford* (1875), L. R. 19 Eq. 436.

(*e*) *Thorp* v. *Dakin* (1885), 52 L. T. 856.

(*f*) Bankruptcy Act, 1883 (46 & 47 Vict. c. 52), s. 167.

(*g*) By *ibid.*, s. 164, s. 16 of the Debtors Act, 1869 (32 & 33 Vict. c. 62), shall be construed as if the term "trustee in any bankruptcy" included "official receiver," and that section is applied to all offences under the Act of 1883.

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creditor (*h*) or member of the committee of inspection that there is ground to believe that a bankrupt has been guilty of an offence under the Debtors Act, 1869, or under the Bankruptcy Acts, the bankruptcy court may, if it thinks that there is a reasonable probability that the bankrupt may be convicted (*i*), order him to be prosecuted by the trustee (*k*). The report of the official receiver ought to be filed (*l*) and considered by the court, whose duty it is to consider (then or thereafter) whether the bankrupt ought to be prosecuted, even though the official receiver may not ask for a prosecution (*l*).

Whenever a bankruptcy court orders the prosecution of a person for an offence under the Debtors Acts or the Bankruptcy Acts, it is the duty of the Director of Public Prosecutions to institute and carry on the prosecution (*m*).

Committal for trial.

597. A bankruptcy court having ground to believe that the bankrupt or any other person has committed a bankruptcy offence (*n*) which is a statutory misdemeanour, may commit the bankrupt or such other person for trial. For this purpose the court has all the powers of a stipendiary magistrate, and no further inquiry before a magistrate is necessary (*o*).

In cases of felony or when the court does not exercise this power, the ordinary procedure before magistrates must be followed.

Expenses of prosecution.

598. The expenses of a prosecution ordered by the court are paid as if it was a prosecution for felony (*p*). The court may order any person convicted of felony to pay the costs of the prosecution (*q*). Such an order is valid though the prisoner was adjudged bankrupt between arrest and conviction, but it is doubtful whether it would be if there was an act of bankruptcy before the arrest (*r*).

(*h*) Such representation must be in writing, supported by proper evidence, and filed with the proceedings in the bankruptcy (*Ex parte Leonard, Re Leonard* (1875), L. R. 19 Eq. 269). Where the trustee in bankruptcy applies for an order to prosecute, the application is properly made *ex parte* without any notice to the bankrupt, and the bankrupt cannot appeal from the order (*Ex parte Marsden, Re Marsden* (1876), 2 Ch. D. 786; and see *Ex parte Levi, Re Levi* (1865), 34 L. J. (BCY.) 23).

(*i*) Mere suspicion is not enough (*Ex parte W. and G. Strickland, Re Still* (1863), 32 L. J. (BCY.) 12; *Ex parte Stallard, Re Howard* (1868), 3 Ch. App. 408, both cases decided under s. 221 of the Bankruptcy Act, 1861, now repealed). The effect of these decisions seems to have been adopted in the wording of the Debtors Act, 1869 (32 & 33 Vict. c. 62).

(*k*) Debtors Act, 1869 (32 & 33 Vict. c. 62), s. 16.

(*l*) *Re Dunn, Ex parte Senior Official Receiver*, [1902] 1 K. B. 107.

(*m*) Bankruptcy Act, 1883 (46 & 47 Vict. c. 52), s. 166. All necessary papers are forwarded to the Public Prosecutor.

(*n*) *I.e.*, one of those enumerated pp. 345 *et seq.*, *ante*.

(*o*) Bankruptcy Act, 1883 (46 & 47 Vict. c. 52), s. 165: "The power has not, it is believed, been exercised" (Williams on Bankruptcy (1904), p. 379). The bankruptcy court has not power to compel the bankrupt to appear either by summons or warrant.

(*p*) Debtors Act, 1869 (32 & 33 Vict. c. 62), s. 17. See title CRIMINAL LAW AND PROCEDURE.

(*q*) Forfeiture Act, 1870 (33 & 34 Vict. c. 23), s. 3.

(*r*) *R.* v. *Roberts* (1873), L. R. 9 Q. B. 77. The costs will not be allowed out of the estate (*Re Howes, Ex parte White*, [1902] 2 K. B. 290; see also *R.* v. *Thomas* (1870), 22 L. T. 138), at all events unless there are special circumstances (*Re Stanlake & Son, Ex parte Priestley* (1878), 10 Ch. D. 774).

Election by prosecution.

599. If any offence is punishable both under the Debtors Act, 1869, and under some other law, the prosecutor must elect to proceed under one or the other; there cannot be two punishments for the same offence (*s*).

Court having jurisdiction.

600. An offence under the Debtors Act, 1869, may be tried at the Central Criminal Court, assizes, quarter sessions (*t*), the King's Bench Division of the High Court, or if against a peer or peeress for felony, by the House of Lords (*u*).

A charge of obtaining goods on credit by false representations (*v*) is triable in the court having jurisdiction where the goods were obtained, not necessarily where the false representations were made (*w*). Similarly where the charge is that of obtaining credit to the extent of £20 or upwards while an undischarged bankrupt, without disclosing the fact of being an undischarged bankrupt (*x*), the charge is triable in the court having jurisdiction where the credit was obtained (*y*).

Application of Vexatious Indictments Act.

601. Every misdemeanour under ss. 11—23 of the Debtors Act, 1869, is subject to the Vexatious Indictments Act (*a*); and any justice before whom any person is charged therewith is required to consider any evidence tending to show that the act charged was not committed with a guilty intent (*a*).

Indictment.

602. The indictment need not be in technical language, but need only set out the substance of the charge, in words as nearly as possible those of the Act (*b*).

Where the exact words are "under false pretences or by means of any other fraud" (*c*), "under" is used advisedly instead of "by";

(*s*) Debtors Act, 1869 (32 & 33 Vict. c. 62), s. 23.

(*t*) *Ibid.*, s. 20.

(*u*) See title CRIMINAL LAW AND PROCEDURE.

(*v*) Debtors Act, 1869 (32 & 33 Vict. c. 62), s. 11 (13); s. 13 (1).

(*w*) Where a bankrupt by false pretences made verbally in Glasgow got goods delivered in Durham, a conviction in Durham was held good (*R.* v. *Ellis* (1898), 19 Cox, C. C. 210).

(*x*) Bankruptcy Act, 1883 (46 & 47 Vict. c. 52), s. 31.

(*y*) *R.* v. *Peters* (1886), 16 Cox, C. C. 36. Where an undischarged bankrupt bought fish in Suffolk, and sent some into the county of Lincoln, a conviction in the latter county was quashed, as the Court for Crown Cases Reserved held that the credit was obtained in Suffolk (*R.* v. *Dawson* (1888), 16 Cox, C. C. 556).

(*a*) Debtors Act, 1869 (32 & 33 Vict. c. 62), s. 18. See title CRIMINAL LAW AND PROCEDURE. The short effect of the Vexatious Indictments Act, 1859 (22 & 23 Vict. c. 17), is to prevent indictments from being presented in certain specified cases unless the prosecutor has obtained leave, or provision has been made (by recognisance or otherwise) for due prosecution of the accused.

(*b*) Debtors Act, 1869 (32 & 33 Vict. c. 62), s. 19. Where an indictment alleged a conspiracy to remove goods fraudulently (contrary to s. 11 (5) of the Debtors Act, 1869, p. 347, *ante*) against, *inter alios*, the debtor, a trader, liable to become bankrupt, but did not allege that the defendants conspired in contemplation of or with a view to a bankruptcy, it was said (on error) that although it was not necessary to prove that the debtor was adjudged bankrupt, yet the indictment ought to allege the conspiracy to be in contemplation of bankruptcy, but it was held that the objection, which might have been good on demurrer, was cured by the verdict (*Heymann* v. *R.* (1873), L. R. 8 Q. B. 102).

(*c*) Debtors Act, 1869 (32 & 33 Vict. c. 62), s. 13 (1), p. 350, *ante*. For an indictment quashed for repugnancy, see *R.* v. *Harris* (1849), 1 Den. 461, note (*s*), p. 345, *ante*.

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an indictment which charges a debtor with having obtained credit under false pretences or by means of other frauds, without setting out the false pretences by means of which the debt or liability was incurred, is good (*d*).

Where the offence charged is within a section in which the time is material (*e*), that time must be strictly averred in the indictment (*f*) ; it cannot be amended after verdict.

Evidence.

603. Where material to the offence, the bankruptcy petition and adjudication must be proved. The petition is proved by the production of the petition itself, or of a certified copy (*g*) ; the adjudication by the production of the adjudication under the seal of the court (*h*), or of a certified copy (*g*), or of a copy of the *London Gazette* containing notice of such adjudication (*i*).

Where an offence is committed unless the jury is satisfied that there was not intent to defraud (*k*), the onus is on the defendant of proving that he had no such intent (*l*), and for that purpose he may give evidence of statements made by him at a meeting of creditors before he was adjudicated bankrupt (*m*).

On a charge of obtaining credit under false pretences or by fraud (*n*), evidence of acts either preceding or subsequent (*o*) to the alleged offence is admissible for the purpose of proving a systematic course of conduct, and in order to negative mistake or accident (*p*).

Depositions.

In case of the death of the debtor or his wife, or of anyone who has been a witness in any court in any proceeding under the Bankruptcy Act, 1883, his or her deposition properly authenticated may be received in evidence (*q*).

The depositions of the debtor on his public examination in bankruptcy,—when he must answer all questions allowed by the court,—which are on oath and read over to or by and signed by him, may be used against him in respect of an offence under the Debtors Acts and the Bankruptcy Acts (*r*).

(*d*) *R.* v. *Pierce* (1887), 56 L. J. (M. C.) 85, following *R.* v. *Watkinson* (1872), 12 Cox, C. C. 271, and dissenting from *R.* v. *Bell* (1871), 12 Cox, C. C. 37.

(*e*) *E.g.*, s. 11 (14) of the Debtors Act, 1869, p. 349, *ante*.

(*f*) *R.* v. *Oliver and Austin* (1877), 13 Cox, C. C. 588.

(*g*) Bankruptcy Act, 1883 (46 & 47 Vict. c. 52), s. 134.

(*h*) An order of adjudication under the seal of the court was admitted, as LUSH, J., thought that a provision in the Bankruptcy Act, 1869, corresponding with s. 134 of the Act of 1883, was "cumulative" (*R.* v. *Thomas* (1870), 11 Cox, C. C. 535, at p. 538).

(*i*) Bankruptcy Act, 1883 (46 & 47 Vict. c. 52), s. 132. A cutting from the *Gazette* is not enough (*R.* v. *Lowe* (1883), 15 Cox, C. C. 286).

(*k*) Debtors Act, 1869 (32 & 33 Vict. c. 62), s. 11 (1)—(4), (6), (14), (15)

(*l*) *R.* v. *Thomas* (1870), 11 Cox, C. C. 535 ; *R.* v. *Bolus* (1870), 23 L. T. 339.

(*m*) *R.* v. *Wiseman* (1901), 20 Cox, C. C. 144.

(*n*) Debtors Act, 1869 (32 & 33 Vict. c. 62), s. 13 (1).

(*o*) *R.* v. *Rhodes*, [1899] 1 Q. B. 77.

(*p*) *R.* v. *Francis* (1874), 12 Cox, C. C. 612 ; *R.* v. *Wyatt*, [1904] 1 K. B. 188.

(*q*) Bankruptcy Act, 1883 (46 & 47 Vict. c. 52), s. 136.

(*r*) *Ibid.*, s. 17 (8), and Bankruptcy Act, 1890 (53 & 54 Vict. c. 71), s. 2. See p. 73, *ante*. They cannot be used against him in respect of certain misdemeanours, all of the nature of breach of trust or embezzlement, enumerated

Admissions which a debtor has made at his public examination may be proved by parol evidence (*s*).

in ss. 75—85 of the Larceny Act, 1861 (24 & 25 Vict. c. 96), for ss. 75, 76, of which s. 1 of the Larceny Act, 1901 (1 Edw. 7, c. 10), is substituted. The exception is made by the Bankruptcy Act, 1890 (53 & 54 Vict. c. 71), s. 27 (2). The immunity of the debtor is strictly confined to a "compulsory" deposition, such as that in the public examination, and does not extend to the statement of affairs made under s. 16 of the Bankruptcy Act, 1883 (*R.* v. *Pike* (1902), 20 Cox, C. C. 164)

(*s*) *R.* v. *Erdheim*, [1896] 2 Q. B. 260, where a shorthand writer took down the evidence, but none of the transcripts were read over to or signed by the debtor. The shorthand writer was called.

BANNS.

See HUSBAND AND WIFE.

BAPTISM.

See ECCLESIASTICAL LAW; EVIDENCE.

BARBED WIRE.

See BOUNDARIES AND FENCES.

BARONETS.

See PEERAGE AND OTHER DIGNITIES.

BARRATRY.

See ACTION; CRIMINAL LAW AND PROCEDURE; SHIPPING AND NAVIGATION.

BARRISTERS.

(N.B.—It is important to observe throughout this article that the statements as to the practice and the rules and regulations of the profession are statements of matters of etiquette only, and are not rules of law or binding as such. This is pointed out in paragraphs 616 and 676 of the article.—EDS.)

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SECT. 1.—*The Inns of Court.*

SUB-SECT. 1.—*Origin of the Term "Barrister."*

The Inns of Court.

604. The right of practising as counsel in England is reserved to barristers, that is, to those who have been "called to the bar" by one or other of the four Inns of Court. The Inns of Court are the societies of Lincoln's Inn, the Inner Temple, the Middle Temple, and Gray's Inn; they are voluntary unincorporated societies of equal rank and status, independent of the State, which have each a similar constitution, and are bound by the same rules; they are outside the jurisdiction of the courts, but are subject to the visitatorial jurisdiction of the judges. These societies have existed from very ancient times (*a*); they seem originally to have been

Apprentices.

associations of the apprentices (*apprenticii ad legem*), a name which is found in use at the end of the thirteenth century to denote those legal practitioners who were not serjeants-at-law (*servientes ad legem*), but from whose ranks the serjeants were chosen (*b*). In the fourteenth century the apprentices are found living in certain Inns or hostels near the city of London (*c*). Of these Inns the principal were the four Inns or Houses of Court which still remain, and subordinate to them were a number of Inns of Chancery, all of which have now ceased to exist (*d*). In these Inns the apprentices lived a semi-collegiate life, and were subject to a common system

Serjeants-at-law.

of education, discipline, and government. The serjeants-at-law had two Inns of their own, known as Serjeants' Inns, of which the judges of the Courts of Common Pleas and King's Bench, and afterwards of the Exchequer, were also members. The serjeants-at-law were chosen from the ranks of the apprentices, and the

(*a*) "The original institution of the Inns of Court nowhere precisely appears" (*R.* v. *Benchers of Gray's Inn* (1780), 1 Doug. (K. B.) 353, *per* Lord MANSFIELD at p. 354).

(*b*) See the ordinance "De Attornatis et Apprenticiis" of 1292 (Rot. Parl. i. 84); Pollock and Maitland, History of English Law, i., 211—216.

(*c*) The *apprentises in hostels* are mentioned in the Year Book, 29 Edw. 3, 47 a.

(*d*) The last to disappear was Clifford's Inn, as to which see *Smith* v. *Kerr*, [1902] 1 Ch. 774.

persons so chosen were obliged to take upon themselves the degree of serjeant. On becoming a serjeant the apprentice left the Inn of Court to which he belonged, and joined one of the serjeants' Inns. The possession of the degree of serjeant was up to November 1, 1875 (*e*), a necessary qualification for the office of judge of the superior courts of common law, but since that date no new serjeant has been made, the property of the order has been sold, and the order is now almost extinct in England (*f*).

Origin of the term "barrister."

605. One of the chief objects of the Inns of Court was to make provision for the practical study of the common law and for the instruction of all their members in that science. The system of education consisted of readings on statutes, moots or arguments on points of law, chiefly real property law, and the putting of cases. The members of the Inns of Court, before they could become practitioners, were obliged to attend at and take part in some of these exercises. It was in connection with the moots that the term "barrister" originated (*g*). The procedure at the moots was a copy of the proceedings in the Court of Common Pleas, or Common Bench, as it was often called. The senior members of the society formed the bench, and were called masters of the bench or benchers; the persons who argued at the bar of the Inn in imitation of the serjeants, who then had exclusive audience at the bar of the Common Pleas, were called masters of the utter or outer bar or utter barristers, because they sat "uttermost" on the forms which constituted the bar in the hall, or library, or chapel of the Inn where the moots were held (*h*). The members of the Inn who took part in these exercises and sat inside on the same form and merely recited the pleadings were at first called masters of the inner bar or inner barristers, and were afterwards called students. The system of education in the Inns of Court was subject to the control of the judges, who only granted audience in their courts to those members of these societies who satisfied the required conditions (*i*). No member of an Inn of Court could have a chamber in his Inn or be in commons, unless he kept moots within three years after his admission (*k*). After being "usually in commons," and "keeping the case" in hall, and performing a competent number of moots in

(*e*) Supreme Court of Judicature Act, 1873 (36 & 37 Vict. c. 66), s. 8; Supreme Court of Judicature (Commencement) Act, 1874 (37 & 38 Vict. c. 83).

(*f*) At the present date there is only one survivor of the order, namely, Lord LINDLEY.

(*g*) The earliest known instance of the use of the word "barrister" is in the Black Books of Lincoln's Inn in Trinity Term, 1455, where "two of the best barristers" of the Inn (*duo de optimis barrer.*) are mentioned. In 1465 occurs the first mention of "utter barresters" (Lincoln's Inn Black Books, i. 26, 41). The earliest known reference to the word "barrister" outside the records of the Inns of Court is in the Statute of Sewers, 1531 (23 Hen. 8, c. 5), s. 10, which makes it a qualification for a commissioner of sewers to be "learned in the laws of this realm, that is to say, admitted in one of the four principal Inns of Court for an utter barrister."

(*h*) Fortescutus Illustratus, by Waterhouse, 544.

(*i*) Between 1558 and 1665 numerous orders were made by the judges for the government of the Inns of Court. See Dugd. Orig. 311—324.

(*k*) Judges' Orders of 1574; Dugd. Orig. 312.

SECT. 1. The Inns of Court.

the house to which he belonged, and in one of the Inns of Chancery, the member, when of seven years' standing from admission, could be called to the utter bar (*l*). After being so called he could not continue to keep his rank of utter barrister, unless for three years after his call he exercised ordinary mootings and other ordinary exercises of learning "both in his own Inn and in one of the Inns of Chancery" (*m*). He was not entitled to be heard in the courts as an advocate, or to "subscribe any action, bill, or plea," until he had passed a period of probation (at first five and afterwards three years from his call), and continued during that period "in exercises of learning" (*n*).

Call to the bar.

606. The call to the utter bar seems at first to have taken place at a moot, and was originally the act of a reader, which was the name given to a senior member of the society who was appointed to read on a statute, and who after his reading became a bencher (*o*). Moots were held in the course of the reading. Afterwards the call to the bar was made by the whole body of benchers (*p*). The system of readings and moots, which seems to have been in force as early as the fourteenth century (*q*), began to decay under the Stuart kings, and was discontinued or passed into an empty form before the end of the reign of Charles II. (*r*), but has left its trace in the degree of utter barrister, which the benchers of the Inns of Court still have the sole right of conferring (*s*). As the degree of barrister could only be conferred by the Inns of Court, so it could only be taken away by them. The possession of the degree of barrister was recognised by the judges as a necessary qualification without which no one could practise as an advocate in the courts, and thus the benchers became the sole authority by which the position of advocate in the courts could be conferred or taken away. All power which they have in this respect is said to be delegated to them from the judges (*t*).

(*l*) Judges' Orders of 1594 and 1596; Dugd. Orig. 314, 316. The period of seven years was reduced to five (or three in the case of Oxford and Cambridge graduates) in 1762 (Lincoln's Inn Black Books, iii. 374), and in 1835 to three years (*ibid.*, iv. 189, 190), which is the period now fixed.

(*m*) Judges' Orders of May, 1596; Lincoln's Inn Black Books, ii. 45; Inner Temple Records, i. 413.

(*n*) Judges' Orders of 1574 and 1614; Dugd. Orig. 312, 318. No period of probation is now required.

(*o*) Lincoln's Inn Black Books, i. 212, 263; Middle Temple Records, i. 21.

(*p*) Judges' Orders of April 15, 1630; Dugd. Orig. 321.

(*q*) See Year Book, 29 Edw. 3, 47 a, where the judges said of a plea taken before them that it was never taken in court, but they had heard it often *entre les apprentises in hostels.*

(*r*) See North's Lives of the Norths, i. 149, 151.

(*s*) See *Re Perara* (1887), 3 T. L. R. 677. The term "barrister-at-law," which is found in some modern statutes (*e.g.*, Payment of Small Debts Act, 1845 (8 & 9 Vict. c. 127), s. 9), seems to have been formed by popular usage in imitation of the terms "apprentice-at-law," "serjeant-at-law" and "counsellor-at-law." The term "barrister-at-law" is unknown to the Inns of Court. The term "inner barrister" has passed out of use, and its place has been taken by the word "student." In popular language the terms "inner bar" and "outer bar" are sometimes used as synonyms for King's counsel and junior barristers respectively, see p. 387, *post.*

(*t*) *R.* v. *Benchers of Gray's Inn* (1780), 1 Doug. (K.B.) 353; *Re Justices of the Court of Common Pleas at Antigua* (1830), 1 Knapp, 267.

SUB-SECT. 2.—*Powers of the Benchers of the Inns of Court.*

SECT. 1. The Inns of Court.

607. In the Inns of Court as now constituted there are three ranks of members, namely, students, barristers, and benchers. The benchers are the governing body, who alone have power to fill up vacancies in or to add to their own number, to admit persons as students, to call students to the bar (*u*), and to exercise a disciplinary jurisdiction over the members of the society. While the four Inns are independent of each other, they act together in matters affecting their common interest. No person who has been expelled from one of the Inns is admitted a member of any of the others (*a*). The four Inns have agreed on certain regulations which govern the admission of students and the calling of barristers (*b*); they have founded and provide funds for the Council of Legal Education, which makes provision for the instruction and examination of students in law, and to which the Inns have delegated the task of testing the intellectual fitness of students desiring to be called to the bar.

Constitution of the Inns of Court.

608. The benchers of each Inn decide all questions relating to the fitness, other than intellectual, of students to be called, and exercise a disciplinary power over all their members. They can refuse to admit a person as student, or to call a student to the bar. They can expel any member, and can disbar a barrister and disbench one of their own number. The property of each Inn is vested in trustees, appointed out of their number, and is managed solely by the benchers. They, too, decide on the amount of the fees which the members of the Inn have to pay, and on the application of the moneys so raised. In all these matters they are entirely outside the jurisdiction of the ordinary courts, but their decisions are subject to an appeal to the Lord Chancellor and the judges of the High Court of Justice, sitting as a domestic tribunal (*c*). A barrister must, so long as he is in practice, continue to be a member of an Inn of Court (*d*).

Powers of the benchers.

A barrister may be disbarred on his own petition, and if he wishes to become a solicitor he must be so disbarred, for he cannot, without being disbarred, serve as a clerk to a solicitor, or be put on the

Disbarring.

(*u*) The call by the bench is not completed by, or dependent on, any judicial Act (*Re Perara* (1887), 3 T. L. R. 677).

(*a*) Fort. De Laud. cap. 49, ed. Amos, p. 186. See GOULD, J.'s note of *Savage's Case* (1777), quoted in *R.* v. *Benchers of Gray's Inn* (1780), 1 Doug. (K. B.) 353, at p. 355.

(*b*) Consolidated Regulations of the Four Inns of Court. Those now in force are dated January, 1907, but the regulations are revised and varied from time to time.

(*c*) *Booreman's Case* (1642), March, 177; *R.* v. *Benchers of Gray's Inn, supra; Cunningham* v. *Wegg* (1787), 2 Bro. Ch. Rep. 241; Judicature Act, 1873 (36 & 37 Vict. c. 66), s. 12. Up to 1837 no appeal lay to the judges against a refusal of one of the Inns to admit a student, but since then, the judges, by consent of the Inn, hear appeals against a refusal to admit. See Report of the Proceedings before the Judges as Visitors of the Inns of Court on the Appeal of A. Hayward, Esq., Q.C. (1846), p. 95, Pearce, Inns of Court, 2nd ed. 386. As to refusals to call to the bar, see *Harvey's Case* (1821), Pearce, Inns of Court, 2nd ed. 405; First and Second Reports of the Select Committee on the Inns of Court (1834).

(*d*) See *Neate* v. *Denman* (1874), L. R. 18 Eq. 127; *Seymour* v. *Butterworth* (1862), 3 F. & F. 372, at p. 381; *Hudson* v. *Slade* (1862), 3 F. & F. 390.

SECT. 1. The Inns of Court.

roll of solicitors (*e*). Disbarring, when a barrister does not petition to be disbarred, is a punishment inflicted by the benchers on a barrister who is guilty of conduct unbecoming his profession (*f*). A bencher who is guilty of such conduct would be disbenched as well as disbarred (*g*). If the benchers disbench one of their own number, or disbar a barrister, they must assign a reason for their action (*h*).

A student has an inchoate right to be called to the bar, but a barrister has no inchoate right to be called to the bench, and if a barrister, even of the rank of King's counsel, is proposed for election by one bencher and seconded by another, the benchers may refuse to elect him, and need assign no reason for their refusal (*i*).

Immunity of the benchers.

609. The benchers cannot, in respect of any act done by them in their official capacity, be made defendants in any legal proceeding (*k*). The courts have refused to grant a mandamus to the benchers to admit a person as a student (*l*), or to call a student to the bar, and will not determine questions of title to chambers which belong to any of the Inns of Court (*m*). The benchers, however, may themselves resort to the courts for the sake of recovering arrears due from members, or of enforcing bonds given by members for such arrears, or for recovering possession of their property. Such actions are generally brought in the name of the obligees of the bonds, or the trustees in whom the property of the Inn is vested; when such actions are brought, the courts will not entertain any defence which questions the reasonableness of the charges made (*n*), or the propriety or lawfulness of the benchers' decisions (*o*). The only remedy open to a member, or would-be member, who considers himself aggrieved by any order or decision of the benchers is to appeal to the Lord Chancellor and the judges of the High Court (*p*).

SUB-SECT. 3.—*The Admission of Students and the Calling of Barristers.*

Admission of students.

610. No person can be called to the bar in England unless he is a student of one of the four Inns of Court. In order that a person

(*e*) *Re Bateman* (1845), 2 Dow. & L. 725. A barrister of not less than five years' standing may become a solicitor at once on being disbarred and on passing the solicitors' final examination; a barrister of less than five years' standing must be bound by a contract in writing to serve, and must serve, as a clerk to a solicitor for three years (Solicitors Act, 1860 (23 & 24 Vict. c. 127), ss. 3, 16; Solicitors Act, 1877 (40 & 41 Vict. c. 25), s. 12; Consolidated Regulations of the Four Inns of Court, January, 1907, p. 5).

(*f*) *Hudson* v. *Slade* (1862), 3 F. & F. 390.

(*g*) *Manisty* v. *Kenealy* (1876), 24 W. R. 918.

(*h*) Report of the Proceedings before the Judges as Visitors of the Inns of Court on the Appeal of A. Hayward, Esq., Q.C. (1846), at p. 126.

(*i*) *Ibid.*, pp. 89, 90, 158.

(*k*) But see *Hudson* v. *Slade*, *supra*.

(*l*) *R.* v. *Benchers of Lincoln's Inn* (1825), 4 B. & C. 855.

(*m*) *Booreman's Case* (1642), March, 177; *Cunningham* v. *Wegg* (1787), 2 Bro. Ch. Rep. 241. But see *Rakestraw* v. *Brewer* (1728), 2 P. Wms. 511.

(*n*) *Earl of Rosslyn* v. *Jodrell* (1815), 4 Camp. 303.

(*o*) *Manisty* v. *Kenealy* (1876), 24 W. R. 918; *Neate* v. *Denman* (1874), L. R. 18 Eq. 127.

(*p*) See p. 361, *ante*.

SECT. 1.
The Inns of Court.

may become a student he must possess certain intellectual qualifications, he must not be a member of certain professions or engaged in certain occupations, and he must be a gentleman of respectability and a proper person to be admitted a student of an Inn with a view to being called to the bar (*q*). The intellectual fitness of a person who wishes to be admitted a student is tested by his being required to pass a preliminary examination which every applicant for admission must, with some exceptions, undergo (*r*).

Disqualifications.

No person can be admitted a student who, at the time of his admission, is or is acting directly or indirectly in the capacity of a solicitor, or in any of certain other enumerated capacities (*s*), or who is engaged in trade (*t*), or is an undischarged bankrupt; a person who has been acting or practising in any of the above-named capacities must, in order to be admitted a student, have entirely and *bonâ fide* ceased to act or practise in any of these capacities, and if on the rolls of any court must have taken his name off the rolls (*a*). In the application for admission as a student the applicant must declare that he is not, either directly or indirectly, acting in any of the above-named capacities, and that he is not engaged in trade and that he is not an undischarged bankrupt (*b*).

(*q*) No woman can be admitted a student of an Inn of Court. It is not now necessary that a person should be a British subject in order to be admitted a student or to be called to the bar (Consolidated Regulations of the Four Inns of Court (January, 1907), s. 8, n. (3)). Up to July 31, 1868, all persons who were called to the bar had to take the oath of allegiance to the sovereign in the Court of King's Bench or in some court of quarter sessions (stat. 1 Will. & Mar. c. 8), but the obligation for barristers to take the oath of allegiance was abolished by the Promissory Oaths Act, 1868 (31 & 32 Vict. c. 72), s. 9. See 23 Law Quarterly Review, 438. The indirect result of this Act has been to admit aliens to the English bar.

(*r*) Consolidated Regulations of the Four Inns of Court (January, 1907), ss. 1—6, 14, 17, 18. As to members of the Irish bar and of the bar of New South Wales, Ceylon, or the Cape of Good Hope, of three years' standing, see *ibid.*, ss. 16, 17. As to vakils, see *ibid.*, s. 18 (1).

(*s*) Namely, attorney-at-law, writer to the signet, writer of the Scotch courts, proctor, notary public, clerk in Chancery, parliamentary agent, agent in any court (original or appellate), clerk to any justice of the peace, registrar or high bailiff of any court, official, provisional, assistant, or deputy receiver or liquidator under any bankruptcy or winding-up Act, chartered, incorporated, or professional accountant, land agent, surveyor, patent agent, consulting engineer, clerk to any judge, barrister, conveyancer, special pleader or equity draftsman, clerk of the peace, or clerk to any officer in any court of justice; the disqualification extends to any person acting either directly or indirectly in any capacity similar to any of those enumerated and to any person being or acting as clerk to or in the service of any person acting in any of the above capacities, or in any capacity similar thereto (except as a pupil in solicitor's office), and to any person holding any appointment which involves the performance of duties analogous to those of a clerk to any officer in any court of justice. These disqualifications do not necessarily apply to persons holding these positions elsewhere than in the United Kingdom; in such cases each application for admission is considered on its merits (*ibid.*, s. 7).

(*t*) This regulation may be relaxed when such special circumstances are shown to exist as would render the occupation of the applicant compatible with his qualification for and his practice of the profession of a barrister (*ibid.*) s. 7, n. (2)).

(*a*) *Ibid.*, s. 7

(*b*) *Ibid.*, s. 8.

SECT. 1. The Inns of Court.

Certificates.

The applicant must also before admission obtain two separate certificates, each to be signed by a barrister of five years' standing, who must state that he believes the applicant to be a gentleman of respectability and a proper person to be admitted a student with a view to being called to the bar (*c*).

Requisites for call.

611. A student cannot in general be called to the bar, unless he has kept a certain number of terms, passed a public examination on certain legal subjects, and paid the requisite fees (*d*).

Keeping of terms.

Terms are kept by dining in term time (*e*) in the hall of the Inn of which the student is a member (*f*). A student must in general keep twelve terms before being called to the bar (*g*).

Council of Legal Education.

The power and duty of superintending the education and examination of students are intrusted to the Council of Legal Education, which consists of twenty benchers, five of whom are nominated by each Inn of Court (*h*). The Council provides the means for the education of students in the general principles of law, and in the

(*c*) Consolidated Regulations of the Four Inns of Court (January, 1907), s. 8. When an Indian, colonial, or foreign student has been admitted to any Inn of Court, a notification of his admission, with the usual particulars as to his name and description, is to be transmitted to the registrar of the principal court of civil jurisdiction in the province, colony, or place to which the student belongs, with a request that such notification may be screened or otherwise displayed in the bar library or other convenient place in the said court, for the information of the bar (*ibid.*).

(*d*) A student who at any time previously to his admission at an Inn of Court was a solicitor in practice for not less than five consecutive years, either in England or in any colony or dependency, and who was admitted in England, and has ceased to be a solicitor, may be called to the bar on passing the public examination without keeping any terms (*ibid.*, s. 14).

(*e*) The terms in the Inns of Court are four in number, and begin as follows:—Michaelmas, November 2; Hilary, January 11; Easter, the second Tuesday after Easter Sunday; Trinity, the second Tuesday after Whit Sunday. They each last for different periods varying from twenty-one to twenty-eight days.

(*f*) *Ibid.*, ss. 10—13. Members of the Universities of Oxford, Cambridge, Dublin, London, Durham, the Royal University of Ireland, St. Andrews, Aberdeen, Glasgow, Edinburgh, the Victoria University (Manchester), the University of Birmingham, or any other University in the United Kingdom founded by Act of Parliament or Royal Charter, can keep terms by dining in hall for any three days in each term (*ibid.*, s. 11). Other students can keep terms by dining in hall for any six days in each term (*ibid.*, s. 12). No day's attendance in hall is available for the purpose of keeping terms unless the student attending is present at the grace before dinner, during the whole of the dinner, and until the concluding grace is said, unless the acting treasurer on any day during dinner thinks fit to permit the student to leave earlier (*ibid.*, s. 13).

(*g*) As to solicitors, see note (*d*), *supra*. A student may, in special circumstances, be excused from keeping any term or terms, not exceeding two (*ibid.*, s. 20). A member of the Irish bar of three years' standing and a member of the bar either of New South Wales, Ceylon, or the Cape of Good Hope of three years' standing may be called to the English bar on keeping three terms without submitting to any examination (*ibid.*, ss. 16, 17). A student who obtains a studentship or certificate of honour awarded by the Council of Legal Education may be granted a dispensation of two terms (*ibid.*, s. 59). A vakil, on production of a certificate from a barrister that he has attended as a student for twelve months in the said barrister's chambers in London, may be granted a dispensation of four terms, in addition to the dispensation of two terms which may be granted to him on obtaining a studentship or certificate of honour (*ibid.*, s. 18 (2)).

(*h*) *Ibid.*, s. 26.

law as practically administered in England and other parts of the British Empire; this education is given by means of lectures and classes, attendance at which is not, however, compulsory (*i*). With certain exceptions (*k*), no person can be called to the bar in England unless he has, to the satisfaction of the Council of Legal Education, passed a public examination for the purpose of ascertaining his fitness to be called to the bar, and has obtained from the Council a certificate of having passed such examination (*l*).

Examination.

A student can only be called to the bar during term (*m*), and the call is made on the same day in each of the Inns (*n*). A student cannot be called until his name and description have been screened in the hall, benchers' room, and treasurer's or steward's office of the Inn of which he is a student for twelve days in term before his call (*o*); the name and description of every such student must be sent to the other Inns, and must also be screened for the same space of time in their respective halls, benchers' rooms, and treasurers' or stewards' offices (*p*).

Time of call.

Before being called to the bar a student must sign a declaration that he is not in holy orders (*q*), or that, if he is in holy orders, he has not during the year next before the date of the declaration held or performed any clerical preferment or duty, or performed any clerical functions, and does not intend any longer to act as a clergyman; he must also state that he is not and has never since his admission as a student been, and that he does not act and has not since his admission acted either directly or indirectly in the capacity of a solicitor or in any of the other enumerated capacities, the acting in any one of which is a disqualification for admission, and that he is not and has not since his admission been engaged in trade, and that he is not an undischarged bankrupt (*r*). The student also

Declaration on call.

(*i*) Consolidated Regulations of the Four Inns of Court (January, 1907), s. 30.

(*k*) See *ibid.*, ss. 16 and 17, as to members of the Irish bar and of the bars of New South Wales, Ceylon and the Cape of Good Hope.

(*l*) *Ibid.*, s. 21. As to the rules which regulate this examination, see *ibid.*, ss. 42—54. The council at this examination awards certain studentships and certificates of honour (*ibid.*, ss. 55, 56). Students who have obtained studentships and certificates of honour rank in seniority over all students called on the same day; students who have obtained certificates of honour rank immediately after the holder of a studentship called on the same day (*ibid.*, s. 58).

(*m*) *Ibid.*, s. 24; Judges' Orders of 1574; Dugd. Orig. 312.

(*n*) Consolidated Regulations of the Four Inns of Court (January, 1907), s. 24.

(*o*) *Ibid.*, s. 22.

(*p*) *Ibid.*, s. 23. A student who has passed the public examination and is otherwise qualified to be called to the bar may, with the permission of the benchers of his Inn, take out a certificate to practise "under the bar," *i.e.*, as a conveyancer, special pleader or draftsman in equity; the name of such a student must be screened in the same way as if he wished to be called to the bar. The permission to take out such a certificate is granted for one year only, but may be renewed annually (*ibid.*, s. 25). At the present time there appear to be two certificated special pleaders and draftsmen in equity, of whom one is a certificated conveyancer (Law List, 1908).

(*q*) See the *Case of Horne Tooke*, 20 State Tr. 687, n.; 2 Lud. E. C. 281.

(*r*) See p. 363, *ante*. Students admitted before March 22, 1901, may omit the part of the declaration which relates to an accountant; students admitted before May 17, 1904, may omit the parts which relate to having held an

SECT. 1. The Inns of Court.

in the declaration undertakes that, if he is called to the bar, he will not, so long as he remains a barrister, in England or elsewhere, except so far as may be there permitted or recognised, be or act directly or indirectly in the capacity of a solicitor or in certain other enumerated capacities (*s*); he also undertakes that he will not, so long as he is in practice as a barrister, in England or elsewhere, except so far as may be there permitted or recognised, be or act in the capacity of clerk to any justice of the peace or in certain other enumerated capacities (*t*).

Fees.

A student, before being called, must further pay all sums due to the Inn; the fees payable on admission and call vary in each Inn (*u*).

Proposal by bencher.

In order to be called to the bar a student must be proposed for call by one of the benchers of his Inn and seconded by another. No one can be called to the bar who is under the age of twenty-one (*a*).

SECT. 2.—*Organisation of the Bar.*

SUB-SECT. 1.—*The Circuit System.*

Circuits.

612. For the purpose of the assizes (*b*), all England except Middlesex is divided into seven circuits, namely, the Northern Circuit (Westmoreland, Cumberland, and Lancashire), the North-Eastern (Northumberland, Durham, and Yorkshire), the Midland (Lincolnshire, Nottinghamshire, Derbyshire, Warwickshire (*c*), Leicestershire, Northamptonshire, Rutland, Buckinghamshire, and Bedfordshire), the South-Eastern (Norfolk, Suffolk, Huntingdonshire, Cambridgeshire, Hertfordshire, Essex, Kent, Sussex, and Surrey), the Oxford (Berkshire, Oxfordshire, Worcestershire, Staffordshire, Shropshire, Herefordshire, Monmouthshire, Gloucestershire), the Western

appointment involving the performance of duties analogous to those of a clerk to any officer in any court of justice and to engaging in trade; students admitted before April 18, 1905, may omit the part which relates to a land agent, surveyor, patent agent, and consulting engineer (Consolidated Regulations of the Four Inns of Court (January, 1907), s. 24).

(*s*) Namely, attorney-at-law, writer to the signet, writer of the Scotch Courts, proctor, notary public, clerk in Chancery, parliamentary agent, agent in any court original or appellate, chartered, incorporated, or professional accountant, patent agent, clerk to any judge, barrister, conveyancer, special pleader or equity draftsman, clerk of the peace, or clerk to any officer in any court of justice. The student also undertakes not to hold any appointment which involves the performance of duties analogous to those of a clerk to any officer of any court of justice (*ibid.*).

(*t*) Namely, land agent, surveyor, consulting engineer, and certain official positions set out p. 384, *post* (*ibid.*).

(*u*) The stamp duty payable on admission to an Inn of Court is £25, but persons who have been previously admitted to another Inn of Court or to the Society of King's Inns in Dublin are exempt from duty. The duty payable on call is £50, but Scotch advocates are exempt from duty, and Irish barristers pay £10 only, on being called to the English bar (Stamp Act, 1891 (54 & 55 Vict. c. 39), Sched. I. (Admission)).

(*a*) Consolidated Regulations of the Four Inns of Court (January, 1907), s. 19.

(*b*) See title COURTS.

(*c*) By an order in Council of June 26, 1884, provision was made for the holding of assizes at Birmingham as well as at Warwick (Statutory Rules and Orders Revised to 31 December, 1903, xii. 27). Birmingham is a joint assize town open to the members of the Oxford and Midland circuits.

(Hampshire, Wiltshire, Dorsetshire, Devonshire, Cornwall, and Somerset), and the North and South Wales Circuit, which is divided into two divisions: the North Wales Division (Montgomeryshire, Merioneth, Carnarvonshire, Anglesey, Denbighshire, Flintshire, and Cheshire), and the South Wales Division (Glamorganshire, Carmarthenshire, Pembrokeshire, Cardiganshire, Brecknockshire, and Radnorshire (*d*)).

Circuit mess.

613. Each of these circuits has its own bar, composed of those barristers who have joined the circuit and have been elected members of the circuit mess, which is a society formed of barristers practising on the circuit. Originally formed for the social purpose of dining, the circuit mess supervises the professional conduct of its members, and lays down rules by which its members are bound with reference to professional etiquette on circuit. No barrister can attend more than one circuit or be a member of more than one circuit mess, nor, except in special circumstances, can he join a circuit after the expiration of three years from his call, or change his circuit except within such three years. It was at one time usual for all barristers to join one or other of the circuits, but in the early part of the nineteenth century equity barristers began to cease attending circuit (*e*). Most common law barristers join one or other of the circuits, but there is now no general rule or practice on the subject.

"Going special."

It is not usual for a barrister to hold a brief at the assizes on a circuit of which he is not a member, unless he is specially retained. A barrister who is specially retained, or who "goes special" on a circuit which is not his own, must have a special fee (*f*), and must have some member of the circuit briefed with him.

Quarter sessions.

614. Similarly, practice at the county and borough quarter sessions where barristers have the exclusive right of audience (*g*) is confined to those members of the circuit, to which the county or borough belongs, who have "opened" sessions, *i.e.*, have been present in robes at the sittings of the court within a certain time (usually two or three years) of their joining the circuit (*h*). At each quarter sessions where barristers have the exclusive right of audience, there is a sessions bar, composed of those who have regularly opened sessions and who alone have the right of practising there without a special fee (*i*). Each sessions bar has generally its own mess, and, subject to the circuit rules, lays down regulations with reference to professional etiquette in matters relating to that particular sessions. A barrister who is not a

(*d*) [1876] W. N. p. 88; Statutory Rules and Orders Revised to 31 December, 1903, xii. 26, 42.

(*e*) Atlay, Victorian Chancellors, Vol. I. 386.

(*f*) See p. 408, *post*.

(*g*) See p. 374, *post*.

(*h*) A barrister who has not joined a circuit, but who has a *bonâ fide* intention of joining a particular circuit at the earliest opportunity which the rules of the circuit permit, may attend sessions on such circuit and accept briefs there before he has been actually elected (Annual Statement of the General Council of the Bar, 1896–7, p. 9).

(*i*) As to special fees at sessions, see p. 409, *post*.

SECT. 2. Organisation of the Bar.

member of any particular sessions bar cannot hold briefs at such sessions without receiving a special fee, and having a member of the sessions bar briefed with him (*j*).

Closed and open sessions.

Quarter sessions on circuits where there is a sessions bar are called "closed" sessions. The courts of quarter sessions sitting in London, namely, the Middlesex Sessions, the County of London Sessions, and the City of London Sessions, are "open" sessions, and any member of the bar can practise there, just as in the Supreme Court of Judicature and in the Central Criminal Court, and although members of the bar attending these sessions can make rules relating to their mess, they cannot in any of these cases make rules declaring the sessions "closed" sessions (*k*).

SUB-SECT. 2.—*The General Council of the Bar.*

Bar Committee.

615. Up to recent times there was no organisation of the whole body of the English bar. Each circuit had an organisation of its own in the circuit mess (*l*); there was also a kind of organisation of barristers practising in the Chancery Courts. In December, 1883, a meeting of the English bar was held, when it was resolved that a body to be called the "Bar Committee" should be constituted to "collect and express the opinions of the members of the bar on matters affecting the profession, and to take such action thereon as may be expedient." The Bar Committee, which was composed of persons elected by the whole bar, and was supported by voluntary contributions, continued to act until 1894. In 1892 the committee prepared certain rules for regulating the practice as to retainers, which were approved by the Attorney-General of the day and the Council of the Incorporated Law Society, and are still in force (*m*).

General Council of the Bar.

In 1894 the place of the Bar Committee was taken by the "General Council of the Bar," a consultative and advisory body constituted by regulations approved by the bar in general meetings. These regulations provide that the Council shall be the accredited representative of the bar, and that "its duty shall be to deal with all matters affecting the profession and to take such action thereon as may be deemed expedient" (*n*).

Constitution.

The Council consists of (1) official members, namely, the Attorney-General and Solicitor-General for the time being and every former Attorney-General or Solicitor-General whilst remaining in actual practice at the bar; (2) nominated members, namely, sixteen practising barristers, of whom four are to be nominated by the masters of the bench of each of the four Inns of Court (*o*); (3) elected members, namely, forty-eight practising barristers to be elected by the whole bar, of whom not less than twelve must be of the inner bar, and not less than twenty-four of the outer bar, and

(*j*) Annual Statement of the General Council of the Bar, 1899-1900, p. 8; 1907-1908, p. 9 (as to licensing committees of quarter sessions).

(*k*) Annual Statement of the General Council of the Bar, 1903–4, pp. 9—12; 1905–6, pp. 6—9.

(*l*) See p. 367, *ante*.

(*m*) See Yearly Practice, 1908, ii. pp. 1497—1500, and p. 404, *post*.

(*n*) Twelfth Annual Statement of the Bar Committee and First of the General Council of the Bar.

(*o*) This power of nomination has not so far been exercised.

six at least of less than ten years' standing at the bar at the time of their election (*p*); (4) additional members, namely, such barristers in actual practice, not exceeding six in number, as the council may consider it desirable to appoint by reason of their parliamentary or professional position, or by reason of their representing any circuit or section of the bar not adequately represented (*p*).

SECT. 2. Organisation of the Bar.

Proceedings and powers.

616. The council as a rule meets fortnightly during the sittings of the courts. There are four standing committees, namely, the executive committee, the committee on matters relating to professional conduct, the committee on the business and procedure of the courts, and the committee on court buildings. Special committees are appointed from time to time as required. The Council has continued up to the present time to act as the representative of the bar, and to answer questions and lay down rules regulating the etiquette and practice of the profession, though it possesses no direct disciplinary power (*q*). Its rules are only matters of etiquette and not of law, and are not binding outside the profession (*r*). It also examines and reports on current legislation.

The Council has offices in the Temple, and is supported by contributions provided by the four Inns of Court. The Council publishes annually a statement of its proceedings, which is sent to every barrister having an English address in the Law List, and is submitted to the annual general meeting of the bar, which is usually held on the second Tuesday of the Easter sittings, and presided over by the Attorney-General.

Recognition of its representative character.

The Council is recognised as representative of the bar by the judges and the Legislature. Thus it chooses one of the three persons who advise and assist the Lord Chancellor in the making of rules under the Land Transfer Act, 1875 (*s*), along with the Registrar of the Land Registry and one of the judges of the Chancery Division (*t*); and by virtue of the articles of association of the Incorporated Council of Law Reporting and a subsequent resolution of that council, nominates two barristers for appointment by the Incorporated Council of Law Reporting to be members of that council. Under the charter incorporating the university of Liverpool provision is made that one member of the Court, the supreme governing body of the university, shall be appointed by the General Council of the Bar (*u*). It also chooses one of the members of the committee, with the advice and assistance of which rules of court under the Criminal Appeal Act, 1907, are to be made (*v*).

SECT. 3.—*Rights and Privileges of Barristers.*

SUB-SECT. 1.—*In General.*

Rights and privileges of barristers.

617. As soon as a person has been called to the bar, he can at once begin to practise as a barrister, unless he is disqualified by statute

(*p*) One half of the elected members go out of office each year. Additional members go out of office at the close of the election next following their appointment.
(*q*) See the various annual statements of the General Council of the Bar.
(*r*) *Re Harrisson*, [1908] 1 Ch. 282.
(*s*) 38 & 39 Vict. c. 87, ss. 111, 112, 122.
(*t*) Land Transfer Act, 1897 (60 & 61 Vict. c. 65), s. 22.
(*u*) Annual Statement of the General Council of the Bar, 1903–4, p. 2.
(*v*) 7 Edw. 7, c. 23, s. 18 (2).

SECT. 3. Rights and Privileges of Barristers.

or by some rule of the profession or restricted by some condition imposed by his Inn (*a*). The practice of a barrister is a purely personal one, and does not admit of anything in the least degree resembling partnership (*b*). The business which is within the ordinary scope of the practice of a barrister consists of advocacy, drafting conveyances, pleadings, and other legal documents, and advising on questions of law (*c*).

A barrister has, when in practice, the following rights and privileges: (1) the right of audience as an advocate in all the superior and most of the inferior courts (*d*); (2) the right to draw or prepare "for or in expectation of a fee or reward" instruments relating to real or personal estate or any proceeding in law or equity (*e*); (3) the right to advise on questions of law (*f*); (4) the right of authenticating by his name the report of a case decided in court (*g*); (5) immunity from arrest or civil process when on circuit or going to or returning from the Supreme Court (*h*); (6) exemption from serving on juries or as constable (*i*); (7) privilege for expressions uttered in a professional capacity (*k*); (8) eligibility for certain judicial and other offices (*l*).

SUB-SECT. 2.—*The Right of Audience.*

(1) In Parliament. Right of audience in House of Lords.

618. When the House of Lords is sitting as a tribunal of appeal, counsel have exclusive right of audience (*m*). Counsel are not generally heard before the House of Lords Appeal Committee (*n*). In proceedings on impeachment the accused person has the right to be defended by counsel (*o*).

At the bar of either House.

In proceedings upon bills which affect the status of particular individuals, such as "bills of pains and penalties, disabilities, and

(*a*) See note (*s*), p. 366, *ante*, and p. 384, *post*, as to the offices and occupations that are incompatible with practice at the bar.

(*b*) Annual Statement of the General Council of the Bar, 1902–3, p. 5. Any dealings between members of the bar and solicitors as regards sharing costs or profits are incompatible with the discipline of the bar (Consolidated Regulations of the Four Inns of Court (January, 1907), s. 15).

(*c*) As to what is slander of a barrister by way of his profession, see *Palmer* v. *Boyer* (1594), Owen, 17; *Broke's Case* (1595), Moore, 409; *Snag* v. *Gray* (1571), 1 Roll. Abr. 57; *Peare* v. *Jones* (1634), 1 Roll. Abr. 55; *Bankes* v. *Allen* (1615), 1 Roll. Abr. 54; *Snow* v. *Etty* (1887), 22 L. J. 292.

(*d*) For the tribunals before which a barrister cannot appear, see pp. 376—378, *post*.

(*e*) See p. 378, *post*.

(*f*) See p. 379, *post*.

(*g*) See p. 380, *post*.

(*h*) *Ibid.*

(*i*) *Ibid.*

(*k*) *Ibid.*

(*l*) See p. 381, *post*.

(*m*) In all proceedings in Parliament Irish and Scotch counsel have equal right of audience with English (*A.-G.* v. *Lord Advocate* (1834), 2 Cl. & Fin. 481, *per* Lord BROUGHAM, L.C., at p. 487; Macqueen, Practice of the House of Lords, 203). As to appeals to the House of Lords generally, see title PRACTICE AND PROCEDURE.

(*n*) Appeals to the House of Lords, Directions for Agents, Yearly Practice, 1908, ii. 1688; *Cleaver* v. *Cleaver* (1884), 9 App. Cas. 631, at p. 633. But see *West* v. *Viscount Holmesdale*, Lords' Journals, cix. 359; *A.-G.* v. *West Riding of Yorkshire County Council*, *ibid.* cxxxviii. 416.

(*o*) Treason Act, 1746 (20 Geo. 2, c. 30); Lords' Journals, xlv. 439. As to impeachments generally, see title PARLIAMENT.

disfranchisement," it is usual to allow the parties affected to be heard by counsel at the bar of both Houses (*p*). In the case of public bills counsel have been heard for petitioners against such bills at the bar of both Houses, but only when the particular interests of the petitioners have been involved (*q*). In the case of private bills counsel have been heard at the bar of both Houses (*r*).

Before committees.

Before select committees of either House appointed to inquire into matters concerning the character or conduct of individuals counsel have been heard by order of the House obtained on the petition of the persons concerned (*s*). Before committees on private bills counsel are heard, but have no exclusive right of audience; parliamentary agents have also been heard (*t*).

Counsel who are members of the Legislature.

619. Counsel who are members of the House of Commons cannot appear as advocates before that House or before any parliamentary committee (*a*), but they may plead at the bar of the House of Lords in all matters except those of a legislative character (*b*). Counsel who are members of the House of Lords may argue on an appeal before the House of Lords, but may not appear as counsel before parliamentary committees or at the bar of either House when acting in a legislative character, or before the House of Lords when sitting to try a peer for a criminal offence (*c*).

(2) Privy Council.

620. Before the Judicial Committee of the Privy Council counsel (*d*) have exclusive right of audience as advocates (*e*). Barristers who are Privy Councillors, but not members of the Judicial Committee, may appear before that tribunal (*f*).

(3) Supreme Court of Judicature.

621. In the Supreme Court of Judicature (*g*), which is composed of two branches, the Court of Appeal and the High Court of Justice, English barristers have exclusive right of audience as advocates in

(*p*) Erskine May, Parliamentary Practice, 11th ed. 476.

(*q*) *Ibid.*; Hansard, cxi. 943.

(*r*) Clifford, History of Private Bill Legislation, ii. 852; Erskine May, Parliamentary Practice, 11th ed. 861; and see further, title PARLIAMENT.

(*s*) Erskine May, Parliamentary Practice, 11th ed. 414.

(*t*) Clifford, History of Private Bill Legislation, ii. 871; Erskine May, Parliamentary Practice, 11th ed. 807. As to the Court of Referees of the House upon Private Bills, see *ibid.* 762. See also, as to private bills, title PARLIAMENT.

(*a*) Commons' Journals, cxiii. 247. As to counsel discussing in the House of Commons cases in which they have been professionally engaged, see 122 L. T. Jo. 417.

(*b*) Macqueen, Practice of the House of Lords, 203.

(*c*) *Re Lord Kinross*, [1905] A. C. 468.

(*d*) *I.e.*, English and Irish barristers, Scotch advocates, and all advocates duly qualified in the colonies and dependencies from which appeals lie to the King in Council (Annual Statement of the General Council of the Bar, 1900–1, p. 12). As to precedence of Colonial K.C.'s, see 19 L. J. 596.

(*e*) As to proceedings before the Judicial Committee of the Privy Council, see title COURTS.

(*f*) *Re Lord Kinross, supra.*

(*g*) Constituted by the Judicature Act, 1873 (36 & 37 Vict. c. 66), s. 3. As to proceedings generally in the Supreme Court of Judicature, see title PRACTICE AND PROCEDURE.

SECT. 3. Rights and Privileges of Barristers.

the Court of Appeal (*h*), and in all sittings in open court of the High Court (*i*), except in bankruptcy.

Bankruptcy Court.

At sittings of the High Court in bankruptcy and in appeals to the High Court from a county court sitting in bankruptcy solicitors have an equal right of audience with barristers (*k*), but a solicitor only has this right when he is instructed by a client. The right does not extend to a solicitor's clerk or to a solicitor appearing as an advocate for a solicitor who is instructed by a client (*l*), or to proceedings in the Court of Appeal (*m*).

Chambers.

In sittings of the High Court in chambers counsel have the right to appear, but not the right of exclusive audience (*n*).

Pauper litigants.

Though a litigant, if an individual, may in all courts appear in person as plaintiff or defendant in an action or other civil proceeding, and may conduct his own case, yet a litigant who has been permitted to sue or defend as a pauper, and to whom counsel has been assigned, cannot appear in the Supreme Court of Judicature in person, unless he has been dispaupered (*o*).

Applications which only counsel can make.

622. There are some applications which, if made in open court, can only be made by counsel. Such are applications for the prerogative writ of mandamus (*a*), for a rule in the nature of a mandamus under Jervis's Act (*b*), for a writ of *certiorari* to remove an order of

(*h*) See *Ex parte Russell, Re Elderton* (1887), 31 Sol. Jo. 235.

(*i*) *Cobbett* v. *Hudson* (1850), 15 Q. B. 988 ; *Drake* v. *Morgan* (1858), 27 L. J. (P.) 3 ; *A.-G.* v. *Marmion* (1840), Arm. M. & O. 98. But see *Doxford & Sons* v. *Sea Shipping Co.* (1897), 14 T. L. R. 111. A solicitor cannot even consent to a verdict, but must instruct counsel (*London Engineering and Iron Shipbuilding Co.* v. *Cowan* (1867), 16 L. T. 573). English barristers, partly by common law (*Collier* v. *Hicks* (1831), 2 B. & Ad. 663, at p. 668) and partly by statute (stat. 9 & 10 Vict. c. 54 (Common Pleas) ; Court of Probate Act, 1857 (20 & 21 Vict. c. 77), s. 40 (Probate Court) ; Matrimonial Causes Act, 1857 (20 & 21 Vict. c. 85), s. 15 (Divorce Court) ; stat. 22 & 23 Vict. c. 6, s. 1 (Admiralty Court)), had this right of audience in all the superior courts which existed before the Supreme Court of Judicature Act, 1873, and which were united by that Act into one court. This right, as part of the then existing procedure, was preserved by the Supreme Court of Judicature Acts, 1873 and 1875 (36 & 37 Vict. c. 66, s. 23 ; 38 & 39 Vict. c. 77, s. 21), and the rules made thereunder (Supreme Court of Judicature Act, 1875 (38 & 39 Vict. c. 77), Sched. I., Rules of Court, headnote ; R. S. C., Ord. 72).

(*k*) Bankruptcy Act, 1869 (32 & 33 Vict. c. 71), s. 70 ; Bankruptcy Act, 1883 (46 & 47 Vict. c. 52), ss. 93, 151 ; *Ex parte Reynolds, Re Barnett* (1885), 15 Q. B. D. 169.

(*l*) *Ex parte Broadhouse, Re Broadhouse* (1867), 2 Ch. App. 655 ; *Re Bull* (1852), 20 L. T. (O. S.) 24 ; *Ex parte Streeter, Re Morris* (1881), 19 Ch. D. 216.

(*m*) *Ex parte Russell, Re Elderton* (1887), 31 Sol. Jo. 235.

(*n*) R. S. C., Ord. 55, r. 1 A, Ord. 65, r. 27 (16). See *Re Chapman* (1882), 10 Q. B. D. 54 ; *Re Gregory* (1890), 90 L. T. Jo. 56 ; *Dickson* v. *Harrison* (1878), 9 Ch. D. 243, at p. 246 ; *Re Bethlehem and Bridewell Hospitals* (1885), 30 Ch. D. 541, at p. 542.

(*o*) *Parkinson* v. *Hanbury* (1853), 4 De G. M. & G. 508 ; *Hamer* v. *Boreham* (1858), 27 L. J. (P.) 107 ; *Tucker* v. *Collinson* (1886), 16 Q. B. D. 562.

(*a*) *Ex parte Wason* (1869), 10 B. & S. 580 ; *R.* v. *Mansel Jones* (1889), Short and Mellor's Practice of the Crown Office, 2nd ed. 223 (n.) ; *R.* v. *Stanbury Eardley* (1885), 49 J. P. 551 ; *R.* v. *Mayor and Corporation of Liverpool* (1891) 7 T. L. R. 592. See further title CROWN PRACTICE.

(*b*) Justices' Protection Act, 1848 (11 & 12 Vict. c. 44), s. 5 ; *Ex parte Wallace*, [1902] 2 K. B. 488, overruling *R.* v. *Biron* (1884), 54 L. J. (M. C.) 77, and *Ex parte Lewis* (1888), 21 Q. B. D. 191. See further title CROWN PRACTICE.

justices (*c*), for an information on behalf of the Attorney-General (*d*), for a writ of *habeas corpus* (*e*), for a criminal information (*f*), for an attachment (*g*), for an order to find security for the peace (*h*) or to strike a solicitor off the rolls (*i*).

Criminal Courts.

623. In criminal proceedings in the High Court, or at the assizes, or at the Central Criminal Court, or at those courts of quarter sessions where barristers have exclusive right of audience (*k*), prosecutors are not allowed to appear in person to conduct the proceedings, but prosecutions must be conducted by barristers, who, when acting in this capacity, are said to be in the nature of public officers (*l*). By the common law counsel could not appear in criminal trials for prisoners accused of felony or treason, except to argue points of law (*m*). The common law has been altered by statute and defendants are now allowed to be represented by counsel in all cases (*n*).

Scotch counsel have been allowed to appear at trials in England before special commissioners for treason committed in Scotland (*o*), and English counsel have been allowed to appear at trials for treason held in Scotland under a special commission under the Great Seal of the United Kingdom, and conducted in conformity with English procedure (*p*).

(4) Inferior Courts. Determination of right of audience.

624. In some inferior courts barristers have exclusive right of audience as advocates; in others they have a right of audience

(*c*) In *Ex parte Bradlaugh* (1878), 3 Q. B. D. 509, the application was made by a person who was not a barrister, but the point as to his right to apply does not seem to have been raised. See further title CROWN PRACTICE.

(*d*) *A.-G.* v. *Barker* (1838), 4 My. & C. 262. See further title CROWN PRACTICE.

(*e*) *Re Newton* (1855), 16 C. B., *per* JERVIS, C.J., at p. 99; but a wife may be allowed to apply in person on behalf of her husband (*Ex parte Cobbett* (1850), 15 Q. B. 181, n.). See further title CROWN PRACTICE.

(*f*) *R.* v. *Certain Justices of Lancashire* (1819), 1 Chit. 602; *Doe* d. *Bennett* v. *Hale* (1850), 15 Q. B. 171, at p. 179. See further title CRIMINAL LAW AND PROCEDURE.

(*g*) *Ex parte Fenn* (1834), 2 Dowl. 527. See further title CONTEMPT AND ATTACHMENT.

(*h*) Crown Office Rules, 1906, r. 250. See further title CROWN PRACTICE.

(*i*) *Anon.* (1881), 16 L. J. 153, approving *Anon.* (1834), 3 Nev. & M. (K. B.) 566; *Ex parte Pitt* (1833), 2 Dowl. 439; *Re a Solicitor, Ex parte Incorporated Law Society*, [1903] 1 K. B. 857. When the statutory committee of the Law Society on the investigation of a charge against a solicitor under the Solicitors Act, 1888 (51 & 52 Vict. c. 65), s. 13, reports to the High Court that a *primâ facie* case of misconduct is established, no one but counsel can be heard in support of the charges in the report (*Re a Solicitor*, [1903] 2 K. B. 205). See further title SOLICITORS.

(*k*) See p. 374, *post*.

(*l*) *R.* v. *Certain Justices of Lancashire* (1819), 1 Chit. 602; *R.* v. *Brice* (1819), 1 Chit. 352; *R.* v. *Milne* (circ. 1804), 2 B. & Ald. 606, n.; *R.* v. *Stoddart* (1819), Dickinson's Quarter Sessions, 6th ed. 152; *R.* v. *Gurney* (1869), 11 Cox, C. C. at p. 422; *R.* v. *Page* (1847), 2 Cox, C. C. 221; *R.* v. *Littleton* (1840), 9 C. & P. 671. See further titles CRIMINAL LAW AND PROCEDURE; MAGISTRATES.

(*m*) Hawk. P. C., book 2, chap. 39; 8th ed., Vol. II., p. 554.

(*n*) Treason Act, 1695 (7 & 8 Will. 3, c. 3), s. 1; Trials for Felony Act, 1836 (6 & 7 Will. 4, c. 114), s. 1.

(*o*) *R.* v. *Hardie* (1820), 1 State Tr. (N. S.) at p. 661, n.

(*p*) *R.* v. *Hardie*, *supra*, at p. 609. As to English barristers being admitted to the Irish and colonial bars, see Cordery on Solicitors, 3rd ed., Appendix IV., p. 487; as to Irish and colonial barristers being admitted to the English bar, see Consolidated Regulations of the Four Inns of Court (January, 1907), ss. 16, 17.

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concurrently with solicitors and other persons; in others the court has a discretion to decide whether they shall appear or not; in others barristers are not able to appear at all. In the absence of any statutory enactment or established practice defining what persons are to be heard as advocates, the court itself has the power to regulate its own procedure and to determine what class of persons shall have audience (*q*).

Mayor's Court

In the Mayor's Court in the city of London barristers have exclusive right of audience as advocates at all sittings in open court (*r*).

Quarter sessions.

In most courts of quarter sessions the rule is to give exclusive audience to barristers when a sufficient number, *e.g.*, not less than four, attend (*a*). The making of such a rule is within the jurisdiction of quarter sessions (*b*). At any quarter sessions, where there is a sessions bar, appeals cannot be respited except upon motion by counsel (*c*). When the rules of quarter sessions provide that "consents should be signified by counsel in open court," the clerk of an assessment committee, on an appeal against a valuation list, cannot consent to the alteration of the list; counsel must be instructed to consent (*d*).

County courts.

625. In county courts barristers "retained by or on behalf of any party on either side" may address the court, but have no exclusive right of audience (*e*).

Sheriff's Court.

Before the Sheriff's Court counsel have the right to appear, but have no exclusive right (*f*).

Coroner's Court.

At a Coroner's Court counsel are entitled to be present on behalf of persons interested in the inquiry (*g*).

Petty sessions.

Before justices of the peace sitting as a court of summary jurisdiction or to inquire whether an accused person shall or shall not be committed for trial counsel have the right of audience, but not an exclusive right (*h*).

(*q*) *Ex parte Evans* (1846), 9 Q. B. 279. As to the remedy for an improper refusal to hear counsel, see *R.* v. *Marshall* (1855), 4 E. & B. 475.

(*r*) See 18 L. J. 490.

(*a*) *Ex parte Evans, supra.*

(*b*) *Ibid.* The extra-judicial opinion of Lord DENMAN, C.J., that in borough quarter sessions barristers might be accorded pre-audience, but not exclusive audience (Manning, Serviens ad Legem, 124, n.), is at variance with the decision in *Ex parte Evans, supra*, and, it is submitted, is not law. In most borough quarter sessions of any importance counsel have exclusive right of audience.

(*c*) Annual Statement of the General Council of the Bar, 1903-4, p. 15.

(*d*) *R.* v. *Justices of London*, [1896] 1 Q. B. 659.

(*e*) A solicitor "acting generally in the action or matter" for a party (*R.* v. *Judge of County Court of Oxfordshire*, [1894] 2 Q. B. 440), and, by leave of the judge, "any other person" may also address the court (County Courts Act, 1888 (51 & 52 Vict. c. 43), s. 72). And see further title COUNTY COURTS.

(*f*) If a litigant intends to be represented by counsel on an inquiry to assess damages, he should give notice of his intention to the other side (*Elliot* v. *Nicklin* (1818), 5 Price, 641.

(*g*) *Barclee's Case* (1658), 2 Sid. 101. See *Garnett* v. *Ferrand* (1827), 6 B. & C. 611.

(*h*) Summary Jurisdiction Act, 1848 (11 & 12 Vict. c. 43), ss. 10, 12; Indictable Offences Act, 1848 (11 & 12 Vict. c. 42), s. 19. See *Duncan* v. *Toms* (1887), 56 L. J. (M. C.) 81; *Webb* v. *Catchlove* (1886), 50 J. P. 795; *Ex parte Local Board of Leamington* (1862), 5 L. T. 637. See further title MAGISTRATES.

626. Counsel may appear on behalf of prosecutor or prisoner at general and district military courts-martial, when held in the United Kingdom, or when held elsewhere, if the commander-in-chief or the convening officer declares it expedient to allow such appearance (*i*). A prisoner must give notice of the intention to have counsel either on the day on which he is informed of the charge against him, or at any time not less than seven days before the trial or such shorter time as, in the opinion of the court, would have enabled the prosecutor to obtain counsel. If the convening officer so directs, counsel may appear on behalf of the prosecutor, but, except where the prisoner has himself given notice of his intention to have counsel, notice of the direction must be given to the prisoner at such time, not in any case less than seven days before the trial, as would, in the opinion of the court, have enabled the prisoner to have counsel. Counsel who appear at such a court-martial may address the court and examine and cross-examine witnesses. In courts-martial in which there is no right for counsel to appear on behalf of a prisoner, a prisoner may have a legal adviser to assist him, and the person so assisting him may advise him on all points and may suggest questions, but, it seems, may not examine or cross-examine witnesses himself, and may not address the court (*k*). In naval courts-martial a prisoner may have the assistance of an officer, a legal adviser, or any other person, who may suggest questions and read the prisoner's defence or statement, but cannot address the court (*l*).

Courts-martial.

Before the statutory committee of the Law Society holding a preliminary inquiry into charges against a solicitor under the Solicitors Act, 1888 (*m*), either party may appear in person or by counsel or solicitor (*n*).

Statutory committee of Law Society.

Barristers may practise before the ecclesiastical courts (*o*), but, except when the rules of a particular court so prescribe, have no exclusive right of audience (*p*). Before commissioners appointed under the Church Discipline Act, 1840 (*q*), and in proceedings under the Public Worship Regulation Act, 1874 (*r*), either party may

Ecclesiastical Courts.

(*i*) Manual of Military Law (published by the War Office, 1899), Rules of Procedure, rr. 88—93, pp. 646—649. "Counsel" here means either barrister or solicitor. See also the Army Act, 1881 (44 & 45 Vict. c. 58), s. 129, and the Army Act, 1894 (57 Vict. c. 3), s. 6, as to counsel guilty of contempt at a court-martial. See also title ROYAL FORCES.

(*k*) Manual of Military Law, Rules of Procedure, p. 646, r. 87.

(*l*) Admiralty Instructions, 1899, 633. See further, as to courts-martial, titles COURTS; ROYAL FORCES.

(*m*) 51 & 52 Vict. c. 65, s. 13.

(*n*) Rules under the Solicitors Act, 1888, Part I., s. 5; Yearly Practice, 1908, ii. 1445. See further title SOLICITORS.

(*o*) Phillimore, Ecclesiastical Law, ii. 936. See, as to ecclesiastical courts, title ECCLESIASTICAL LAW.

(*p*) The rules of the Consistory Courts of London, Chichester, Hereford, Lichfield, Ripon, Wakefield, and the Commissary Court of Canterbury give this right in "opposed faculty cases" or when the judge has directed the faculty to be moved for in court (Chancellor Tristram's Consistory Judgments, supplement, 293; Phillimore, Ecclesiastical Law, ii. 998).

(*q*) 3 & 4 Vict. c. 86, s. 3, and see Clergy Discipline Act, 1892 (55 & 56 Vict. c. 32), s. 14 (3). As to the Acts referred to in this and the next note, see generally title ECCLESIASTICAL LAW.

(*r*) 37 & 38 Vict. c. 85, s. 11.

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appear by counsel or solicitor. Barristers may also practise before the Vice-Chancellor's Court at Oxford (*s*).

Income tax etc. appeals.

In appeals to general commissioners from assessments under the Income Tax Acts, and in appeals against assessments to land tax, and in proceedings for penalties before district commissioners of income tax, barristers and solicitors may be heard (*t*).

Local government inquiry.

At an inquiry or arbitration under the Local Government Act, 1894, as to the acquisition of land by or on behalf of a parish council, counsel cannot be heard except in such cases as may be prescribed by order of the Local Government Board (*u*).

Arbitration.

627. It was held that in an arbitration under the Friendly Societies Act, 1855 (*v*), an arbitrator had a discretion to determine whether he would hear counsel or not (*a*). It has been said that arbitrators in general have a like discretion, but in many cases it would be wrong to refuse to hear counsel (*b*). A party to a reference who intends to appear by counsel should give notice to the other side of his intention. If he appears by counsel without notice, and the other party applies for an adjournment in order to instruct counsel, and the arbitrator refuses to adjourn and makes his award, the award may be referred back to the arbitrator (*c*).

In arbitrations as to disputed compensation on the compulsory acquisition of land under the Small Holdings and Allotments Act, 1907 (*d*), counsel cannot be heard except by the direction of the Board of Agriculture and Fisheries (*e*).

Charity Commissioners.

628. On the hearing of an application under the Charitable Trusts Act, 1860 (*f*), the Charity Commissioners have a discretion to determine whether they will hear counsel; they only hear counsel in exceptional cases (*g*).

The chief gas examiner of the metropolitan district has a similar discretion on an appeal from the report of a gas examiner (*h*).

Grand jury.

629. The grand jury in criminal trials only examine witnesses for the prosecution, and neither counsel nor solicitor is present on behalf of either prosecution or defence (*i*).

(*s*) Annual Register, 1863, Chronicle, 35. As to the Vice-Chancellor's court, see title COURTS.

(*t*) Finance Act, 1898 (61 & 62 Vict. c. 10), s. 16, repealing the Taxes Management Act, 1880 (43 & 44 Vict. c. 19), s. 57 (9). See titles INCOME TAX; INHABITED HOUSE DUTY.

(*u*) 56 & 57 Vict. c. 73, s. 9 (11). As to the acquisition of land by a parish council, see titles ALLOTMENTS, Vol. I., p. 348, and PUBLIC HEALTH ETC.

(*v*) 18 & 19 Vict. c. 63, s. 40.

(*a*) *Re Macqueen and Nottingham Caledonian Society* (1861), 9 C. B. (N. S.) 793.

(*b*) *Ibid.* See further title ARBITRATION, Vol. I., p. 461.

(*c*) *Whatley* v. *Morland* (1833), 2 Dowl. 249.

(*d*) 7 Edw. 7, c. 54. See title ALLOTMENTS, Vol. I., p. 347.

(*e*) Small Holdings and Allotments Act, 1907 (7 Edw. 7, c. 54), Sched. I., Part I. (5).

(*f*) 23 & 24 Vict. c. 136, s. 2.

(*g*) *Benthall* v. *Earl of Kilmorey* (1844), Tudor's Charitable Trusts, 4th ed. 599. See *Ex parte Nicholls, Re Hackney Charities* (1865), 34 L. J. (CH.), *per* Lord ROMILLY, M.R., at p. 175. As to the Charity Commissioners generally, see title CHARITIES.

(*h*) *R.* v. *Williamson* (1890), 59 L. J. (Q. B.) 493. As to such appeals, see title METROPOLIS.

(*i*) See title CRIMINAL LAW AND PROCEDURE. The practice was formerly different. See Trials of the Regicides (1660), 5 State Tr. 972, n.; *Weston's Case* (1615), 2 State Tr. at p. 912.

Election petition.

630. A person who has received from a court for the trial of an election petition a notice giving him an opportunity of being heard "by himself" and of calling evidence to show cause why he should not be reported as guilty of a corrupt or illegal practice has no right on appearing to be represented by counsel or solicitor (*k*).

Revision court.

631. In a revising barristers court no party or other person may appear or be attended by counsel (*l*).

Party in contempt.

632. A party who is in contempt may be refused the right of appearing or being represented at a trial or judicial proceeding in which he is interested. A bankrupt who is in contempt and keeps out of the country in order to defeat his creditors has no right to be represented at an inquiry into damages before the official receiver (*m*). But when an appellant alleges that an order was made against him without jurisdiction, the court will not refuse to hear his appeal merely because he is in contempt (*n*).

(5) Non-judicial proceedings. Royal Commissions.

633. There are some proceedings, such as inquiries by Royal Commissions etc., where there may be no right for anyone to appear except persons summoned, and where, therefore, counsel have no right to appear (*o*). But at such inquiries counsel, by the leave of the commissioners, are often present, and examine and cross-examine witnesses.

Non-judicial tribunals.

Assessment committees.

634. It is only judicial tribunals that have the right of determining whether any, and what, class of advocates can appear before them. An assessment committee appointed under sect. 18 of the Union Assessment Committee Act, 1862 (*p*), is not a judicial tribunal, and has no power to determine what class of persons may appear before it; in such cases, where a statute gives a person a right to appear and is silent as to whether he should appear personally or not, there is nothing to limit the right of the objector to appoint as his agent for appearance any person who is not manifestly improper, and therefore he may appear by counsel (*q*). Meetings of county councils when considering the grant of licences for music and dancing are probably in the same category as assessment committees (*r*).

(*k*) *R.* v. *Mansel Jones* (1889), 23 Q. B. D. 29; Corrupt and Illegal Practices Prevention Act, 1883 (46 & 47 Vict. c. 51), s. 38 (1). But see Day's Election Cases in 1892 and 1893, p. 78; *The Bewdley Case* (No. 2) (1869), 1 O'M. & H. at p. 176, *per* BLACKBURN, J.; *The Ipswich Case* (1886), 1 O'M. & H. 70, not reported on this point, cited but not followed in *R.* v. *Mansel Jones*, *supra*, at p. 31. See further title ELECTIONS.

(*l*) Parliamentary Voters Registration Act, 1843 (6 & 7 Vict. c. 18), s. 41. Counsel cannot appear at such a court even if he wishes to act without fee on behalf of a political association with which he is connected (*O'Connor* v. *Nicholson* (1891), 1 Fox & S. Reg. 250). See title ELECTIONS.

(*m*) *Re Langworthy* (1887), *Times* (8 August, 1887).

(*n*) *Gordon* v. *Gordon*, [1904] P. 163. See generally title CONTEMPT AND ATTACHMENT.

(*o*) See, as to the Royal Commissioners appointed to inquire into the Belfast riots in 1886, 21 L. J. 556.

(*p*) 25 & 26 Vict. c. 103. See generally title RATES AND RATING.

(*q*) *R.* v. *Assessment Committee of St. Mary Abbotts, Kensington*, [1891] 1 Q. B. 378.

(*r*) *Royal Aquarium and Summer and Winter Gardens Society* v. *Parkinson*, [1892] 1 Q. B. 431. As to such meetings, see title THEATRES, MUSIC-HALLS, AND

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Disciplinary proceedings.

635. In a proceeding which is merely to enforce discipline and is not judicial (*e.g.*, the meeting of the Vice-Chancellor and heads of colleges of the University of Cambridge for the purpose of discommoning a tradesman) it may be that no notice to the person interested to attend is required, and in such a case he has no right to be present, and therefore has no right to be represented by counsel (*s*).

SUB-SECT. 3.—*Drafting.*

Drafting.

636. The right to draw or prepare, for or in expectation of any fee or reward, any instrument relating to real or personal estate, or any proceeding in law or equity, is limited to barristers, certificated solicitors, notaries public, special pleaders, and draftsmen in equity (*t*). The object of the enactment is to confine the practice of drawing such instruments to a class of persons supposed to have a competent knowledge of the subject, and to protect the public against the mistakes of inexperienced persons (*a*).

Pleadings.

The drafting of pleadings in an action is a matter which generally falls within the province of counsel. Pleadings or a special case, if settled by counsel or a special pleader, must be signed by him, and the settlement of pleadings by counsel, though not now necessary (*b*), is desirable (*c*).

Proceedings in House of Lords and Privy Council.

637. All petitions of appeal to the House of Lords must be signed by two counsel who have attended as counsel in the court below or propose to attend as counsel at the hearing in the House of Lords (*d*). The printed cases which have to be lodged in such appeals must be signed by one or more counsel who have so attended or so propose to attend (*e*). In the Judicial Committee of the Privy Council the printed cases on both sides must be signed by one or more of the counsel who are to attend at the hearing of the cause (*f*).

SHOWS. As to meetings of licensing justices, see *Boulter* v. *Kent Justices*, [1897] A. C. 556; *R.* v. *Woodhouse*, [1906] 2 K. B. 501; *Leeds Corporation* v. *Ryder*, [1907] A. C. 420; and title INTOXICATING LIQUORS.

(*s*) *Ex parte Death* (1852), 18 Q. B. 647.

(*t*) Stamp Act, 1891 (54 & 55 Vict. c. 39), s. 44. "Instrument" here does not include a will or other testamentary instrument, an agreement under hand only, a letter or power of attorney, or a transfer of stock containing no trust or limitations. The section does not extend to any public officer drawing or preparing instruments in the course of his duty, or to any persons employed merely to engross any instrument or other proceeding.

(*a*) *Taylor* v. *Crowland Gas and Coke Co.* (1854), 10 Exch. 293.

(*b*) R. S. C., Ord. 19, r. 4. Before the Supreme Court of Judicature Act, 1873 (36 & 37 Vict. c. 66), pleadings in Chancery, with some exceptions, had to be signed by counsel (Mitford on Pleadings, 48, 208, 301, 315). See *Great Australian Gold Mining Co.* v. *Martin* (1877), 5 Ch. D., *per* JAMES, L.J., at p. 10. At common law before the Common Law Procedure Act, 1852 (15 & 16 Vict. c. 76), s. 85, the signature of counsel was necessary for certain pleas (Tidd's New Practice (1837), 410), but after the last-named Act no signature of counsel to pleadings was necessary. As to pleadings generally, see title PLEADING.

(*c*) *Duckitt* v. *Jones* (1876), 33 L. T. 777.

(*d*) Standing Orders applicable to Appeals to the House of Lords, Ord. 2; Yearly Practice, 1908, ii. 1700; and see title PRACTICE AND PROCEDURE.

(*e*) *Ibid.*, Ord. 5, r. 3. See *Price* v. *Seeley* (1843), 10 Cl. & Fin., *per* Lord COTTENHAM, at p. 41.

(*f*) Order in Council dated March 10, 1730 (Safford and Wheeler, Privy Council

Articles under the Church Discipline Act, 1840 (*g*), must be approved and signed by counsel (*h*).

Interrogatories in writing on attachments in the King's Bench Division must be signed by counsel (*i*).

Other cases where counsel's signature required.

SUB-SECT. 4.—*Advising.*

Advising.

638. The statute 28 Edw. 1, stat. 3, c. 11 against maintenance, expressly reserves the right of persons to have counsel of pleaders or of learned men in the law for a fee (*k*). The giving of legal advice has been from the earliest days of the legal profession one of the chief duties of the practitioners in the courts (*l*).

Where counsel's opinion necessary.

639. In some cases the opinion of counsel is necessary. Thus an appeal cannot be taken to the House of Lords, unless the counsel who sign the petition of appeal also certify its reasonableness (*m*).

No litigant can be admitted to sue *in formâ pauperis*, unless he produces the opinion of counsel that he has reasonable grounds for proceeding (*n*). If a person who has not been admitted to sue or defend as a pauper in the court below wishes to appear on an appeal *in formâ pauperis*, he must make application to the Court of Appeal, and if the applicant is appellant, he must obtain the certificate of counsel at the foot of the notice of appeal that the appeal is proper to be heard (*o*). A similar certificate is required in appeals to the Judicial Committee of the Privy Council (*p*).

Short causes.

In the Chancery Division a cause cannot, in general, be marked as a "short cause," unless there is a certificate of counsel that the cause is fit to be heard as a short cause (*q*).

Practice, 135). Where two Canadian counsel had signed a respondent's case, but neither was briefed at the hearing, the signature of an English counsel who would argue the case was required (Preston, Privy Council Appeals, 170).

(*g*) 3 & 4 Vict. c. 86, s. 7.

(*h*) *Mouncey* v. *Robinson* (1867), 37 L. J. (ECCL.) 8. See title ECCLESIASTICAL LAW.

(*i*) Crown Office Rules, 1906, r. 242 (13). As to attachment generally, see title CONTEMPT AND ATTACHMENT.

(*k*) See Co. Inst. ii. 563. As to maintenance, see title ACTION, Vol. I., p. 52.

(*l*) As to advice of counsel being a protection to the client, see pp. 401 *et seq.*, *post.*

(*m*) Standing Orders applicable to Appeals to the House of Lords, Ord. 2, 1; Yearly Practice, 1908, ii. 1700.

(*n*) R. S. C., Ord. 16, r. 23. See further, as to proceedings *in formâ pauperis*, title PRACTICE AND PROCEDURE.

(*o*) *Re Roberts* (1886), 33 Ch. D. 265.

(*p*) *Lait* v. *Bailey* (1851), 7 Moo. P. C. C. 436; *Watts* v. *Beaman* (1854), 9 Moo. P. C. C. 81. A similar certificate was at one time necessary when an appellant petitioned for leave to proceed *in formâ pauperis* in the House of Lords, but this is rendered unnecessary now, as the reasonableness of all petitions must be certified by counsel. A defendant in an action or respondent to an appeal does not require any certificate of counsel to enable him to defend the action or appear in the appeal *in formâ pauperis*. See R. S. C., Ord. 16, rr. 23, 24; *Handford* v. *George Clarke, Ltd.*, [1907] 1 K. B. 181.

(*q*) Chancery Division, Notice, [1877] W. N., Part II., p. 58; *Felstead* v. *Gray* (1874), L. R. 18 Eq. 92; *Walker* v. *Siggers*, [1875] W. N. 194; *Anon.* (1853), 17 Jur. 435; *Hargraves* v. *White* (1853), 17 Jur. 436; Resolutions of the Judges of the Queen's Bench Division, May 24, 1894, r. 15; Yearly Practice, 1908, ii. 1494.

SECT. 3. Rights and Privileges of Barristers.

A certificate of urgency signed by counsel is necessary before a case will be placed in the vacation judge's paper for hearing, unless special leave has been obtained (*r*).

Vacation matters.

SUB-SECT. 5.—*Reporting.*

Reporting.

640. A barrister has the right of authenticating by his name the report of a case decided in any of the superior courts. As soon as a report is published of any case with the name of a barrister annexed to it, the report is accredited, and may be cited as an authority before any tribunal (*s*).

SUB-SECT. 6.—*Privileges.*

Immunity from arrest on civil process.

641. Barristers whilst going to or returning from the Supreme Court for the purpose of being engaged on business there are entitled to immunity from arrest on civil process (*t*). A barrister on circuit is privileged from arrest on civil process as long as the circuit lasts, whether he has business or not (*u*). The privilege does not, it seems, extend to barristers going to or returning from quarter sessions (*a*).

Exemption from service on juries etc.

Barristers actually practising, *i.e.*, seeking their living by practising (*b*), are exempt from serving upon any juries or inquests whatsoever (*c*) and from serving the office of parish constable (*d*).

Privilege for professional utterances.

The expressions of counsel uttered in his professional capacity with reference to and in the course of a judicial inquiry are absolutely privileged, and no action will lie in respect of them (*e*); but the privilege does not cover the separate publication of a speech which contains defamatory matter (*f*). The privilege of counsel in this respect is the privilege of the client (*g*), the right of every

(*r*) See Vacation Notice published in the official Cause List.

(*s*) See speech of Lord WESTBURY, L.C. (1863), Hansard, Parliamentary Debates, 3rd ser. clxxi. 778; *West Derby Poor Law Guardians* v. *Atcham Poor Law Guardians* (1889), 6 T. L. R., *per* Lord ESHER, M.R., at p. 6.

(*t*) *Meekins* v. *Smith* (1791), 1 Hy. Bl. 636; *Newton* v. *Harland* (1839), 8 Scott, 70; *Pitt* v. *Coombs* (1834), 3 Nev. & M. (K. B.) 212; *Anon.* (1839), 9 L. J. (C. P.) 176. As to arrest on civil process generally, see title PRACTICE AND PROCEDURE.

(*u*) *The Case of the Sheriff of Kent* (1846), 2 Car. & Kir. 197; *The Case of the Sheriff of Oxfordshire* (1846), 2 Car. & Kir. 200; *Meekins* v. *Smith*, *supra*.

(*a*) *Newton* v. *Constable* (1841), 9 Dowl. 933, not following *Luntly* v. *Nathaniel* (1833), 2 Dowl. 51.

(*b*) *The Case of the Sheriff of Oxfordshire*, *supra*, at p. 201.

(*c*) Juries Act, 1870 (33 & 34 Vict. c. 77), s. 9; and see *Re Dutton*, [1892] 1 Q. B. 486. As to juries, see title JURIES.

(*d*) Parish Constables Act, 1842 (5 & 6 Vict. c. 109), s. 6.

(*e*) *Brook* v. *Montague* (1606), Cro. Jac. 90; *Wood* v. *Gunston* (1655), Sty. 462; *R.* v. *Skinner* (1772), Lofft, 55, *per* Lord MANSFIELD, C.J., at p. 56; *Hodgson* v. *Scarlett* (1818), 1 B. & Ald. 232; *Needham* v. *Dowling* (1845), 15 L. J. (C. P.) 9; *R.* v. *Kiernan* (1855), 5 I. C. L. R. 171; *R.* v. *Hutchins* (1858), 7 I. C. L. R. 425; *Mackay* v. *Ford* (1860), 5 H. & N. 792; *Munster* v. *Lamb* (1883), 11 Q. B. D. 588; *Bottomley* v. *Brougham*, [1908] 1 K. B. 584, *per* CHANNELL, J., at p. 587; 3 Bl. Com. 1st ed. 29. The Irish cases of *Higginson* v. *O'Flaherty* (1854), 4 I. C. L. R. 125, and *Butt* v. *Jackson* (1846), 10 I. L. R. 120, are not, it seems, reconcilable with *Munster* v. *Lamb*, *supra*. As to what is a judicial inquiry, see *Royal Aquarium and Summer and Winter Gardens Society* v. *Parkinson*, [1892] 1 Q. B. 431. As to contempt of court by counsel, see p. 385, *post*.

(*f*) *Flint* v. *Pike* (1825), 4 B. & C. 473; *Birch* v. *Walsh* (1846), 10 I. Eq. R. 93.

(*g*) See *R.* v. *Kiernan*, *supra*, at p. 173.

subject in all courts of justice being to assert and defend his rights and to protect his liberty and life by the free and unfettered statement of every fact and use of every argument and observation that can legitimately (*i.e.*, according to the rules and principles of law) conduce to this end (*h*). The rule of law is that what is said in the course of the administration of the law is privileged; and the reason of the rule covers counsel, judge, parties, and witnesses, who in this respect are all equally protected (*i*).

SUB-SECT. 7.—*Eligibility for Judicial and other Offices.*

Offices reserved to barristers.

642. There are certain offices which can only be held by barristers or those who have been barristers, and other offices which can only be held by barristers and solicitors and other persons with specified qualifications (*k*).

Fifteen years' standing.

The office of Lord of Appeal in Ordinary can only be filled by a person who has held for not less than two years certain high judicial offices or has been for not less than fifteen years a practising barrister in England or Ireland or a practising advocate in Scotland (*l*). The office of judge of the Court of Appeal can only be filled by a judge of the High Court of not less than one year's standing, or by an English barrister of fifteen years' standing (*m*). The office of president of the Probate, Divorce, and Admiralty Division can only be filled by a judge of the High Court or Court of Appeal, or by an English barrister of not less than fifteen years' standing (*n*).

Ten years' standing.

Only barristers of not less than ten years' standing can fill the following offices: judge of the High Court (*o*), judge of the Salford Hundred Court (*p*), paid chairman or deputy chairman of the quarter sessions for the county of London (*q*), master in lunacy (*r*), registrar in the Land Registry (*s*). A judge of the Provincial Courts of Canterbury and York must either have been a judge of one of the superior Courts or a barrister who has been in actual practice for ten years (*t*). Only conveyancing counsel in

(*h*) *Butt* v. *Jackson* (1846), 10 I. L. R., *per* BLACKBURNE, C.J., at p. 123. As to the immunity of a barrister from action by his client, see p. 394, *post*.

(*i*) See *Munster* v. *Lamb* (1883), 11 Q. B. D. 588, *per* BRETT, L.J., at pp. 604, 605; *Seaman* v. *Netherclift* (1876), 2 C. P. D. 53; *R.* v. *Skinner* (1772), Lofft, 55; *Bottomley* v. *Brougham*, [1908] 1 K. B. 584, *per* CHANNELL, J., at p. 587; and generally title LIBEL AND SLANDER.

(*k*) For the offices mentioned below, except where otherwise stated, see title COURTS.

(*l*) Appellate Jurisdiction Act, 1876 (39 & 40 Vict. c. 59), s. 6.

(*m*) Supreme Court of Judicature Act, 1873 (36 & 37 Vict. c. 66), s. 8; Court of Chancery Act, 1851 (14 & 15 Vict. c. 83), s. 1.

(*n*) Supreme Court of Judicature Act, 1891 (54 & 55 Vict. c. 53), s. 2.

(*o*) Supreme Court of Judicature Act, 1873 (36 & 37 Vict. c. 66), s. 8.

(*p*) Salford Hundred Court of Record Act, 1868 (31 & 32 Vict. c. cxxx.), s. 14.

(*q*) Local Government Act, 1888 (51 & 52 Vict. c. 41), s. 42 (1). See title METROPOLIS.

(*r*) Lunacy Act, 1890 (53 & 54 Vict. c. 5), s. 111 (3). See title LUNATICS AND PERSONS OF UNSOUND MIND.

(*s*) Land Transfer Act, 1875 (38 & 39 Vict. c. 87), s. 106. See titles REAL PROPERTY AND CHATTELS REAL; SALE OF LAND.

(*t*) Public Worship Regulation Act, 1874 (37 & 38 Vict. c. 85), s. 7. See title ECCLESIASTICAL LAW.

SECT. 3. Rights and Privileges of Barristers.

actual practice who have practised as such for ten years at least can be appointed conveyancing counsel to the court (*a*).

Seven years' standing.

Only barristers of at least seven years' standing can fill the following offices: county court judge (*b*), deputy county court judge (*c*), assistant barrister or assessor in the Liverpool Court of Passage (*d*), revising barrister (*e*), secretary to the Lunacy Commissioners (*f*), stipendiary magistrate for a borough appointed under sect. 161 of the Municipal Corporations Act, 1882 (*g*), and a deputy or assistant judge of a borough or local court of record (*h*). To be a deputy judge of the City of London Court (*i*) or of the Mayor's Court (*k*), or a stipendiary magistrate in the metropolitan police district (*l*), a person must have practised either as a barrister for seven years, or as a special pleader for three years and as a barrister for four.

Five years' standing.

Only barristers of at least five years' standing can fill the following offices: judge of one of the High Courts of Judicature in India (*m*), recorder of a borough having a separate court of quarter sessions (*n*), deputy (*o*) or assistant (*p*) recorder, deputy judge of the Salford Hundred Court (*q*), deputy judge of a borough civil court if appointed under the Municipal Corporations Act, 1882 (*r*), stipendiary magistrate if appointed under the Stipendiary Magistrates Act, 1863 (*s*), and paid legal commissioner in lunacy (*t*).

Three years' standing.

Only a barrister of at least three years' standing can be an examiner of the High Court (*a*).

(*a*) Court of Chancery Act, 1852 (15 & 16 Vict. c. 80), s. 41. See title SALE OF LAND.

(*b*) County Courts Act, 1888 (51 & 52 Vict. c. 43), s. 8. See title COUNTY COURTS.

(*c*) *Ibid.*, s. 18.

(*d*) Liverpool Court of Passage Act, 1834 (4 & 5 Will. 4, c. xcii.), s. 2; Liverpool Court of Passage Act, 1893 (56 & 57 Vict. c. 37), s. 6.

(*e*) Parliamentary Voters Registration Act, 1843 (6 Vict. c. 18), s. 28; Revising Barristers Act, 1874 (37 & 38 Vict. c. 53), s. 6. The appointment of revising barrister is never given to a King's counsel, and if a junior who is a revising barrister takes silk, the practice is not to reappoint him. See title ELECTIONS.

(*f*) Lunacy Act, 1890 (53 & 54 Vict. c. 5), s. 154 (5). See title LUNATICS AND PERSONS OF UNSOUND MIND.

(*g*) 45 & 46 Vict. c. 50. See title MAGISTRATES.

(*h*) Borough and Local Courts of Record Act, 1872 (35 & 36 Vict. c. 86), s. 7.

(*i*) London (City) Small Debts Extension Act, 1852 (15 Vict. c. lxxvii.), s. 8.

(*k*) Mayor's Court of London Procedure Act, 1857 (20 & 21 Vict. c. clvii.), s. 43.

(*l*) Metropolitan Police Courts Act, 1839 (2 & 3 Vict. c. 71), s. 3. See title MAGISTRATES.

(*m*) Indian High Courts Act, 1861 (24 & 25 Vict. c. 104), s. 2. Irish barristers and Scotch advocates are also eligible for this office. See title COLONIES AND DEPENDENCIES.

(*n*) Municipal Corporations Act, 1882 (45 & 46 Vict. c. 50), s. 163. This does not include the Recorder of the City of London.

(*o*) *Ibid.*, s. 166 (1).

(*p*) *Ibid.*, s. 168 (1).

(*q*) Salford Hundred Court of Record Act, 1868 (31 & 32 Vict. c. cxxx.), s. 17.

(*r*) 45 & 46 Vict. c. 50, s. 175. See title COURTS.

(*s*) 26 & 27 Vict. c. 97, s. 3. See title MAGISTRATES.

(*t*) Lunacy Act, 1890 (53 & 54 Vict. c. 5), s. 151 (2). See title LUNATICS AND PERSONS OF UNSOUND MIND.

(*a*) R. S. C., Ord. 37, r. 40. See title PRACTICE AND PROCEDURE.

Only "duly qualified barristers" can fill the office of Common Serjeant of the City of London and judge of the City of London Court (*b*).

643. There are other offices for which there is no statutory qualification, but which have for a long period been filled invariably by barristers or those who have been barristers. To this class belong the offices of Lord Chancellor, Attorney-General and Solicitor-General, and Recorder of London. In recent years the office of Treasury solicitor, who is also Director of Public Prosecutions (*c*), has generally been held by a barrister.

Offices usually filled by barristers.

The solicitors of the Treasury, customs, excise, post-office, stamp duties, or any other branch of His Majesty's revenue, the solicitor of the City of London, the "assistant of the council for the affairs of the Admiralty," and the solicitor to the Board of Ordnance need not be qualified under the Solicitors Act, 1843 (*d*).

644. A salaried clerk of a petty sessional division or a clerk to the justices of a borough must be either a barrister of not less than fourteen years' standing or a solicitor, or must have served as clerk or assistant in a police court or petty sessional court (*e*).

Offices reserved for barristers and solicitors.

The representative of the Director of Public Prosecutions on the trial of an election petition must be either a barrister or solicitor of not less than ten years' standing (*f*). A district registrar in the Land Registry must be a barrister or solicitor or certificated conveyancer of not less than ten years' standing (*g*). A registrar or assistant or deputy registrar in Admiralty must be a barrister or solicitor of ten years' standing (*h*).

Ten years' standing.

A master of the Supreme Court must be or have been a practising barrister or solicitor of five years' standing, or have practised for five years as a special pleader, or as a special pleader and barrister (*i*). An assistant registrar (*k*) or an assistant district registrar (*l*) in the Land Registry must be a barrister, or solicitor, or certificated conveyancer of not less than five years' standing.

Five years' standing.

No person can be appointed clerk of assize, unless he has for not less than three years been a barrister, special pleader,

Three years' standing.

(*b*) Local Government Act, 1888 (51 & 52 Vict. c. 41), s. 42 (14). See title METROPOLIS.

(*c*) Prosecution of Offences Act, 1884 (47 & 48 Vict. c. 58), s. 2. See title CRIMINAL LAW AND PROCEDURE.

(*d*) 6 & 7 Vict. c. 73, s. 47. As to these offices generally, see titles CONSTITUTIONAL LAW; PUBLIC AUTHORITIES AND PUBLIC OFFICERS; REVENUE.

(*e*) Justices' Clerks Act, 1877 (40 & 41 Vict. c. 43), s. 7. See title MAGISTRATES.

(*f*) Corrupt and Illegal Practices Prevention Act, 1883 (46 & 47 Vict. c. 51), s. 43 (7). See title ELECTIONS.

(*g*) Land Transfer Act, 1875 (38 & 39 Vict. c. 87), s. 119. See titles REAL PROPERTY AND CHATTELS REAL; SALE OF LAND.

(*h*) Admiralty Court Act, 1861 (24 & 25 Vict. c. 10), s. 27. See title ADMIRALTY, Vol. I., pp. 79, 117 *et seq.*

(*i*) Supreme Court of Judicature (Officers) Act, 1879 (42 & 43 Vict. c. 78), s. 10.

(*k*) Land Transfer Act, 1875 (38 & 39 Vict. c. 87), s. 106. See titles REAL PROPERTY AND CHATTELS REAL; SALE OF LAND.

(*l*) *Ibid.*, s. 119.

SECT. 3. Rights and Privileges of Barristers.

conveyancer, or solicitor in actual practice or a subordinate officer of a clerk of assize (*m*).

Miscellaneous.

The following offices may be held by either a barrister or a solicitor, but in the case of a barrister no standing is specified: deputy of a borough coroner (*n*), judge of an inferior court of record (*o*) and the deputy judge of such a court if appointed under the Small Debts Act, 1845 (*p*), Probate or Divorce registrar or district registrar (*q*), and examiner in Admiralty (*r*).

Holders of certain offices debarred from practice.

645. The holders of some of the above-named offices are prohibited by statute from practising at the bar, *e.g.*, county court judge (*s*), master of the Supreme Court (*t*), registrar or district registrar of the Probate, Divorce, and Admiralty Division (*a*). The district registrar and assistant district registrar in the Land Registry may practise with the consent of the Lord Chancellor (*b*). The clerk of assize and the associate cannot, while the circuit lasts, be of counsel with any persons within the circuit "otherwise than to that office only appertaineth" (*c*). Barristers may hold some of the above-named appointments and yet continue to practise, *e.g.*, recorder, deputy and assistant recorder, deputy county court judge (*d*), conveyancing counsel to the court, revising barrister, examiner of the court, judge or deputy judge of a borough court. The Attorney-General and Solicitor-General are prevented by a Treasury minute now in force from undertaking any business on behalf of private clients (*e*).

Offices inconsistent with practice.

There are other offices the holding of which is deemed to be inconsistent with practice as a barrister. A barrister who is called under the existing regulations undertakes, so long as he is in practice, not to act as clerk to any justice of the peace, as registrar or high bailiff of any court, as official provisional assistant or deputy receiver or liquidator under any bankruptcy or winding-up Act, as town clerk, clerk to a board of guardians or overseers, or clerk in the office of a county council, or to hold any similar office, or to act as clerk to or in the service of any person acting in any of these

(*m*) Clerks of Assize etc. Act, 1869 (32 & 33 Vict. c. 89), s. 3. "Clerk of assize" includes clerk of the Crown and associate on circuit, and any other office the duties of which were on August 9, 1869, or may at any time afterwards be, performed by the clerk of assize (*ibid.*, s. 8).

(*n*) Municipal Corporations Act, 1882 (45 & 46 Vict. c. 50), s. 172 (1). See title CORONERS.

(*o*) Small Debts Act, 1845 (8 & 9 Vict. c. 127), s. 9.

(*p*) *Ibid.*, s. 12.

(*q*) Court of Probate Act, 1857 (20 & 21 Vict. c. 77), s. 20. See title EXECUTORS AND ADMINISTRATORS.

(*r*) Admiralty Court Act, 1861 (24 & 25 Vict. c. 10), s. 28. See title ADMIRALTY, Vol. I., p. 98.

(*s*) County Courts Act, 1888 (51 & 52 Vict. c. 43), s. 14.

(*t*) Superior Courts (Officers) Act, 1837 (7 Will. 4 & 1 Vict. c. 30), s. 15.

(*a*) Court of Probate Act, 1857 (20 & 21 Vict. c. 77), s. 21.

(*b*) Land Transfer Act, 1875 (38 & 39 Vict. c. 87), s. 119.

(*c*) Stat. 33 Hen. 8, c. 24, s. 5.

(*d*) A deputy county court judge, except of the Westminster County Court, cannot, while acting or being entitled to act as a deputy, practise in any Court within the district for which he acts or is entitled to act (County Courts Act, 1888 (51 & 52 Vict. c. 43), s. 20).

(*e*) Treasury Minute dated July 5, 1895, s. 3.

capacities, or in any similar capacity (*f*). A practising barrister, whether he was called under the existing regulations or not, should not act as a town clerk, clerk to guardians, or overseers, or justices, or as clerk in the office of a county council, or as vestry clerk, public analyst under the Sale of Food and Drugs Acts, 1875 to 1899 (*g*), or registrar of births (*h*).

SECT. 4.—*Relations between Court and Counsel.*

Power of the court to suspend a barrister.

646. Barristers are not, as solicitors are, officers of the court (*i*), and the court has no special control over them, though it has been said that the superior courts have, by virtue of their inherent jurisdiction, power to suspend from practising before them barristers who have been guilty of such misconduct as renders them unfit to practise (*k*). But there is no instance in modern times of the exercise of this power, which is probably now delegated to the benchers of the Inns of Court, to whom the judges report instances which come to their notice of such serious misconduct as renders a barrister unfit to practise.

Punishment for contempt.

647. The court has power to punish a barrister for contempt of court in respect of acts done by him either in a private (*l*) or in a professional (*m*) capacity. The proper punishment for contempt is fine and imprisonment, and courts which exercise the power of punishing an advocate by suspension can only do so when the contempt is of such a nature as to subject the person committing it to an imputation of bad character, so as to render it improper for him to practise in the court (*n*).

A barrister may be punished for contempt in respect of language used by him in the discharge of his functions as an advocate (*o*). Expressions which might be uttered in the honest discharge of

(*f*) Consolidated Regulations of the Four Inns of Court (January, 1907), s. 24. See pp. 365, 366, *ante*.

(*g*) 38 & 39 Vict. c. 63, s. 10; 62 & 63 Vict. c. 51, s. 25.

(*h*) Annual Statement of the General Council of the Bar, 1896-7, p. 9, 1898-9, pp. 9, 10, 1899-1900, p. 5.

(*i*) *Wettenhall* v. *Wakefield* (1833), 2 Dowl. 759.

(*k*) *Re Justices of the Court of Common Pleas at Antigua* (1830), 1 Knapp, 267; Manning, Serviens ad legem, 42; Statute of Westminster I. (3 Edw. 1, c. 29); Co. Inst. ii. 213; Bl. Com. iii. 29; *Redding's Case* (1680), T. Raym. 376; Bac. Abr. Courts, 7th ed. ii. 399; *Mitchell's Case* (1741), 2 Atk. 173.

(*l*) *Mitchell's Case, supra*; *Re Wallace* (1866), L. R. 1 P. C. 283.

(*m*) *Lechmere Charlton's Case* (1836), 2 My. & Cr. 316; *Watt* v. *Ligerwood* (1874), L. R. 2 Sc. & Div. 361; *Re Pollard* (1868), L. R. 2 P. C. 106; *Smith* v. *Justices of Sierra Leone* (1841), 3 Moo. P. C. C. 361; *Ex parte Pater* (1864), 9 Cox, C. C. 544; *Rainy* v. *Justices of Sierra Leone* (1852-3), 8 Moo. P. C. C. 47; *Linwood* v. *Andrews* (1888), 58 L. T. 612. See further title CONTEMPT AND ATTACHMENT.

(*n*) See the following cases relating to colonial and Indian Courts: *Re Monckton* (1837), 1 Moo. P. C. C. 455; *Smith* v. *Justices of Sierra Leone* (1848), 7 Moo. P. C. C. 174; *Re Downie* (1841), 3 Moo. P. C. C. 414; *Re Pollard* (1868), L. R. 2 P. C. 106; *Re Wallace* (1866), L. R. 1 P. C. 283; *Newton* v. *Judges of the High Court, North-West Provinces* (1871), L. R. 4 P. C. 18; *Ex parte Renner*, [1897] A. C. 218; *Re Sarbadhicary* (1906), 23 T. L. R. 180.

(*o*) See *Fuller's Case*, 12 Co. Rep. 41, 43; *Ex parte Pater* (1864), 9 Cox, C. C. 544. As to contempt of a court-martial, see the Army Acts, 1881 and 1894 (44 & 45 Vict. c. 58, s. 129; 57 & 58 Vict. c. 3, s. 6).

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counsel's duty, and which, if so uttered, would be privileged, are, when uttered with the intention to insult the jury or the court, an abuse of the privilege of counsel, and may be punished accordingly by the judge (*p*).

There are old instances of counsel being punished for prolix, frivolous, and scandalous pleadings (*q*), and rebuked for tricky pleading and vexatious proceedings (*r*), but there do not appear to be any modern reported instances of such cases.

Assigning counsel.

648. The courts have the power to assign counsel to litigants in some cases. When a person has been admitted to sue or defend as a pauper, the court may assign counsel or solicitor or both, and counsel and solicitor, when so assigned, cannot refuse their assistance, unless they satisfy the court that they have good reasons for refusing. They cannot take any fee for their services without being guilty of contempt of court (*s*).

In treason, if the accused person so requests, the court may assign such counsel, not exceeding two, as the accused desires, and thereupon the counsel so assigned are to have free access at all reasonable times to the accused (*t*).

The Poor Prisoners' Defence Act, 1903, and the Criminal Appeal Act, 1907, make provision in certain cases for the assignment of counsel and solicitor to poor prisoners (*a*).

In proceedings in error upon a judgment of a court of assize, criminal court, or any inferior court of record, if the plaintiff in error assigns errors in person and is in custody, he has to be brought

(*p*) *Ex parte Pater* (1864), 9 Cox, C. C. 544.

(*q*) In Chancery, see Mitford on Pleading, 48; *Emerson* v. *Dallison* (1660), 1 Rep. Ch. 194; *Hill's Case* (1603), Cary, 38; *Everet* v. *Williams* (1725), Lindley on Partnership, 7th ed. 107, n. In the common law courts, see *Hickman* v. *Clarke* (1615), 2 Fowler's Exchequer Practice, 407.

(*r*) *Dundass* v. *Lord Weymouth* (1777), Cowp. 665; *Yates* v. *Carlisle* (1761), 1 Wm. Bl. 270, 291; *R.* v. *Wheeler* (1761), 3 Burr. at p. 1258.

(*s*) R. S. C., Ord. 16, rr. 26, 27. See *Carson* v. *Pickersgill & Sons* (1885), 14 Q. B. D. 859. These rules do not apply to the Probate, Divorce, and Admiralty Division, or to the House of Lords, and there is nothing to prevent counsel in these courts receiving fees from a pauper (*Richardson* v. *Richardson*, [1895] P. 276, 278; *Nieroth* v. *Boileau* (1886), 2 T. L. R. 478).

(*t*) Treason Act, 1695 (7 & 8 Will. 3, c. 3), s. 1. For a recent instance of this, see the official transcript of the shorthand note of the Lord Chief Justice's charge to the grand jury in *R.* v. *Lynch* (1902), p. 7. As to assigning counsel before or apart from the Act, see *Darnel's Case* (1627), 3 State Tr. 4, 19; *Elliot's Case* (1629), 3 State Tr. 309; *Prynn's Case* (1632–3), 3 State Tr. 572; *Prynn's Case* (1637), 3 State Tr. 720; *Lilburn's Case* (1637), 3 State Tr. 1347; *Earl of Holland's Case* (1649), 4 State Tr. 1211; *Love's Case* (1651), 5 State Tr. 134, 135; *R.* v. *Chamberlain* (1833), 6 C. & P. 93. Counsel can only be assigned at the request of prisoner or litigant. In *R.* v. *Yscuado* (1854), 6 Cox, C. C. 386, where a prisoner stood "mute of malice," the court would not accede to a suggestion that counsel should be assigned. The effect of the assignment of counsel is to give him liberty of access to a prisoner (*Love's Case, supra*).

(*a*) The fees of such counsel are paid in the same manner as the expenses of prosecutions on indictments for felony (Poor Prisoners' Defence Act, 1903 (3 Edw. 7, c. 38), s. 1; Criminal Appeal Act, 1907 (7 Edw. 7, c. 23), ss. 10, 13 (2)). See title CRIMINAL LAW AND PROCEDURE.

In criminal trials, particularly in cases of murder, the judge often requests a barrister to give his honorary services to a prisoner (*R.* v. *Fogarty* (1851), 5 Cox, C. C. 161).

into court and assign errors and move that counsel may be assigned to him (*b*).

In proceedings on impeachment in the House of Lords, the party impeached may on his application have not more than two counsel assigned to him to make his defence at any time after the articles of impeachment have been exhibited (*c*).

Forensic costume.

649. Counsel cannot, as a general rule, be heard in court unless they are robed. Counsel robe in all sittings of the House of Lords, in all sittings in open court of the Supreme Court of Judicature, the Privy Council (*d*), the Mayor's Court, the county courts, courts of quarter sessions, and other similar courts of record, and in Committees of either House of Parliament. It is not necessary to robe in judges' chambers, or before arbitrators, or magistrates in petty sessions, or in coroners' courts (*e*).

SECT. 5.—*Precedence.*

Precedence of counsel.

650. There are certain rules governing the precedence or preaudience of counsel. The right of audience in court is conferred by the Inns of Court; the right of preaudience or precedence is conferred by the Crown (*f*). The English bar is divided into two ranks: (1) the King's Counsel and those barristers who have patents of precedence (*g*)—these wear silk gowns and sit "within the bar" in the Supreme Court, and are called "silks" or "leaders" (*h*); (2) all barristers who are not of that rank—these sit outside the bar, wear stuff gowns, and are called "stuff gownsmen" or "juniors" (*i*).

The Attorney-General takes precedence of all other barristers in the Supreme Court (*k*). Next to him comes the Solicitor-General, and then come the King's Counsel and those to whom patents of precedence have been granted. These rank *inter se* according to the date of their patents. With the King's Counsel rank the Queen

(*b*) Crown Office Rules, 1906, r. 179. See *Mansell* v. *R.* (1857), 8 E. & B. at p. 68. In misdemeanour the plaintiff in error need not have counsel assigned to him (Crown Office Rules, 1906, r. 181). But see now the Criminal Appeal Act, 1907 (7 Edw. 7, c. 23), which abolishes writs of error in the case of all prisoners convicted after April 18, 1908, (s. 20).

(*c*) Treason Act, 1746 (20 Geo. 2, c. 30). As to impeachment generally, see title PARLIAMENT.

(*d*) See Dugd. Orig. 321.

(*e*) The Bar Council have expressed an opinion that it is desirable that counsel appearing at courts-martial should do so in robes (Annual Statement of the General Council of the Bar, 1904–5, p. 11).

(*f*) *A.-G. for Dominion of Canada* v. *A.-G. for Province of Ontario*, [1898] A. C. 247.

(*g*) Of late years the practice of the Crown granting patents of precedence has fallen into disuse. No practising barrister in England now holds such a patent. The last grant was in 1883 to Sir Walter Phillimore (now PHILLIMORE, J.), when at the bar.

(*h*) On some circuits there is no such distinction of seating; and at one time there was no such distinction in London at Nisi Prius. See *R.* v. *Carlile* (1834), 6 C. & P. 636.

(*i*) As to the holders of certificates to practise under the bar, see note (*p*), p. 365, *ante*.

(*k*) *A.-G.* v. *Lord Advocate* (1834), 2 Cl. & Fin. 481.

SECT. 5. Precedence.

Consort's Attorney-General and Solicitor-General (*l*). Then come the junior barristers, whose precedence *inter se* is determined by the date of their call (*m*). The general rule is that a stuff gownsman should not accept a junior brief to another stuff gownsman junior to him in point of call (*n*).

In the House of Lords, where Irish barristers and Scotch advocates are heard as well as English barristers, the Attorney-General has precedence; next to him comes the Lord Advocate, then the Solicitor-General (*o*). In the Judicial Committee of the Privy Council, where colonial counsel are heard as well as English, Scotch, and Irish, it was at one time the practice for English King's Counsel to lead in all cases, but Lord James of Hereford when Attorney-General gave an opinion that colonial barristers should take rank there according to their colonial precedence (*p*).

King's Counsel and juniors.

651. According to a long-standing rule of the profession, King's Counsel, except when appearing for a plaintiff *in formâ pauperis* (*q*), cannot hold a brief for the plaintiff on the trial of a civil cause without a junior, and in most other cases a King's Counsel must have a junior briefed with him (*r*). King's Counsel only appear at judge's chambers or in inferior courts in exceptional cases (*s*). A King's Counsel cannot appear in a case against the Crown, even if the Crown be only a nominal party, without a licence from the Crown (*t*). In the Chancery Division a King's Counsel on "taking silk" generally attaches himself to a particular court, and does not accept a brief in any other court of first instance without a special fee (*a*).

On being called within the bar a King's Counsel gives up that part of a barrister's practice which consists of drafting and of writing opinions on evidence, but may settle any such drafting and advise on evidence in consultation with a junior (*b*). In the

(*l*) Bl. Com. iii. 28, n.

(*m*) If two counsel are called to the bar on the same day at the same Inn of Court, they take precedence in the order of their call, but if called on the same day at different Inns of Court, the one whose name has been longest on the book of his inn is the senior (*Case of Abbott and Peake* (1834), 6 C. & P. 637, n.). At every call to the bar those students who have obtained studentships or certificates of honour take seniority over all other students called on the same day (Consolidated Regulations of the Four Inns of Court (January, 1907), s. 58; see note (*l*), p. 365, *ante*).

(*n*) Annual Statement of the General Council of the Bar, 1905-6, p. 10.

(*o*) *A.-G.* v. *Lord Advocate* (1834), 2 Cl. & Fin. 481. See Macqueen, Practice of House of Lords, 337.

(*p*) (1884), 19 L. J. 596.

(*q*) *James* v. *Harris* (1835), 7 C. & P. 257.

(*r*) Seventh Annual Statement of the Bar Committee, 1889-90, p. 2; Annual Statement of the General Council of the Bar, 1901-2, p. 4; 1902-3, p. 3; 1906-7, p. 10. See *Cooke* v. *Turner* (1844), 12 Sim. 649.

(*s*) See *Dickson* v. *Harrison* (1878), 9 Ch. D., *per* JESSEL, M.R., at p. 246; Dickinson, Quarter Sessions, 5th ed., p. 135.

(*t*) See *R.* v. *Jones* (1840), 9 C. & P. at p. 404; *R.* v. *Bartlett* (1846), 2 Car. & Kir. 321; *A.-G. for Dominion of Canada* v. *A.-G. for Province of Ontario*, [1898] A. C. 247, 252; Short and Mellor's Crown Office Practice, 2nd ed. 117, 194, 613.

(*a*) Annual Statement of the General Council of the Bar, 1898-9, p. 11; 1900-1, p. 11.

(*b*) Annual Statement of the General Council of the Bar, 1901-2, p. 5; 1905-6, p. 12.

Chancery Division the rule is that a King's Counsel should not, except in consultation with a junior, settle pleadings even in cases in which he has been engaged before taking silk; in the King's Bench Division it is in the discretion of a junior who has taken silk to refuse to do this work except in consultation with a junior, and this course is often followed (*c*).

When two or more counsel are briefed together on the same side, the leader has the conduct of the case, and the court will not generally allow a junior counsel to take up a line different from that taken up by his leader (*d*).

SECT. 6.—*Counsel and Client.*

SUB-SECT. 1.—*Intervention of Solicitor between Counsel and Client.*

Intervention of solicitor.

652. The usage and etiquette of the profession of a barrister require that in all but some exceptional cases counsel should not undertake any professional work as regards which the relation of counsel and client can arise except on the instructions of a solicitor. There is no rule of law to prevent a litigant from instructing counsel directly, or to prevent counsel so instructed from appearing on behalf of a litigant (*e*); but a judicial opinion has been expressed that it is expedient in the interests of suitors and for the satisfactory administration of justice to adhere to the usage which requires that counsel should not accept a brief in a civil suit from anyone but a solicitor (*f*). The exact scope of the usage is not very clearly defined, but it extends to all civil contentious business, and to all criminal business except what is known as a "dock defence" (*g*). It does not extend to the preparation of a will, to work before parliamentary committees, where counsel may appear when instructed by parliamentary agents who need not be solicitors, or to inquiries under the Local Government Acts, the Public Health Acts, or the Light Railways Act; at such inquiries counsel may be instructed by clerks to local authorities who are not solicitors (*h*). A barrister may advise in non-contentious business without the

(*c*) Annual Statement of the General Council of the Bar, 1900-1, p. 11.

(*d*) See *Pickering* v. *Dowson* (1813), 4 Taunt. 779.

(*e*) *Doe* d. *Bennett* v. *Hale* (1850), 15 Q. B. 171.

(*f*) *Ibid.*, *per* Lord CAMPBELL, C.J., at p. 186, who, speaking in 1850, refers to "the almost uniform usage which has prevailed upon the subject for more than a century."

(*g*) *I.e.*, on the trial of an indictment, or on the hearing of an appeal under the Criminal Appeal Act, 1907 (7 Edw. 7, c. 23), a barrister in court may be instructed directly by the prisoner from the dock, see Annual Statement of the General Council of the Bar, 1900-1, p. 7; 1907-8, p. 8). A prisoner at assizes and quarter sessions is entitled to the services of counsel for the sum of £1 3*s.* 6*d.*, except where the rules of the particular circuit or sessions permit 21*s.* only to be accepted. The fee for a dock defence should be handed to the barrister by the prisoner himself at the time when he asks counsel to defend him, and in open court (*ibid.* 1906-7, p. 8). A barrister is not entitled to accept a dock defence at police courts without the intervention of a solicitor (*ibid.* 1900-1, p. 7). When a judge in criminal trials requests a barrister to give his honorary services to a prisoner, there is no intervention of a solicitor (*R.* v. *Fogarty* (1851), 5 Cox, C. C. 161).

(*h*) Annual Statement of the General Council of the Bar, 1902-3, p. 9. As to receiving instructions from patent agents, see Annual Statement of the General Council of the Bar, 1905-6, p. 11. See also *Thompson* v. *Maskery* (1882), 73 L. T. Jo. 401.

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intervention of a solicitor, though the practice has been stated to be undesirable (*i*).

Counsel's fees.

653. It follows from the interposition of the solicitor between counsel and client that counsel looks for his fees to the solicitor and not to the client (*k*). A solicitor under his general retainer to act for a client has authority to instruct counsel and to pay counsel's fees (*l*). The fees should be marked on the brief beforehand (*m*), and ought to be paid when the brief is delivered (*a*).

For counsel to allow the fees to be altered after the litigation has ceased is against professional etiquette, and to say that a barrister has allowed his fees to be altered in this way is a slander on him in the way of his profession and actionable *per se* (*b*). So counsel ought not to receive for professional work any sum of money except stated and specific fees for particular matters; he ought not to receive money generally on account without specifying the cause and matter and each particular item (*c*); neither ought he to agree with the solicitor to wait for payment of his fees until the latter has received them from his client (*d*). It is a breach of professional etiquette for a barrister to agree with a solicitor to do all his cases of a particular class at a fixed fee in each case (*d*).

Not legally recoverable.

654. If counsel does not insist on the payment of his fees when the brief is delivered, he has no remedy, and cannot recover the fees by action or by any legal process either from the solicitor (*e*) or the client (*f*). In general the jurisdiction which the court exercises over solicitors will not be used for the purpose of compelling a solicitor to pay counsel's fees even when the solicitor has received them from the client (*g*), but in some circumstances the non-payment of fees to counsel by a solicitor who has received money to pay them may be a ground for the exercise of the disciplinary jurisdiction of the court over solicitors (*h*). If a solicitor who has

(*i*) Annual Statement of the General Council of the Bar, 1896-7, p. 11.

(*k*) *Re Wilton* (1843), 13 L. J. (Q. B.) 17, *per* PATTESON, J. at p. 21; *Re Seal* (1893), 37 Sol. Jo. 685. When a solicitor acts as London agent for a country solicitor, the London agent is responsible to counsel for his fees (*Re Nelson* (1885), 30 Ch. D., *per* PEARSON, J., at p. 10).

(*l*) *Hobart* v. *Butler* (1859), 9 I. C. L. R. 157, 165; Co. Inst. ii. 564. But he is not justified in instructing counsel whom his client wishes him not to instruct (*Re Harrisson*, [1908] 1 Ch. 282.

(*m*) *Carson* v. *Pickersgill* (1885), 14 Q. B. D., *per* BRETT, M.R., at p. 868; *Snow* v. *Etty* (1887), 22 L. J. 292. See Annual Statement of the General Council of the Bar, 1905–6, p. 12.

(*a*) *Morris* v. *Hunt* (1819), 1 Chit. 544, 551; *Hobart* v. *Butler*, *supra*, at p. 167.

(*b*) *Snow* v. *Etty*, *supra*. See Tenth Annual Statement of the Bar Committee, p. 2; Annual Statement of the General Council of the Bar, 1903-4, p. 14.

(*c*) See *Re Smith* (1841), 4 Beav., *per* LANGDALE, M.R. at p. 317. As to counsel receiving annual payment or salary, see Annual Statement of the General Council of the Bar, 1896-7, p. 11.

(*d*) Annual Statement of the General Council of the Bar, 1906-7, p. 12.

(*e*) *Moor* v. *Row* (1630), 1 Rep. Ch. 38; *Re May* (1858), 4 Jur. (N. S.) 1169; *Re Le Brasseur and Oakley*, [1896] 2 Ch. 487, 494. See title BANKRUPTCY AND INSOLVENCY, p. 209, *ante*.

(*f*) *Kennedy* v. *Brown* (1863), 13 C. B. (N. S.) 677. See title BANKRUPTCY AND INSOLVENCY, p. 209, *ante*.

(*g*) See *Re F.* (1883), 18 L. J. 352; *Re Cockayne* (1884), 19 L. J. 500.

(*h*) *Re a Solicitor* (1894), 63 L. J. (Q. B.) 397; *Re a Solicitor* (1901), *Times*

received a specific sum to pay counsel's fees does not pay them and becomes bankrupt or dies, it seems that counsel may prove for such fees in the bankruptcy (*i*), or in the administration of the estate, if it is being administered by the court (*k*).

Part of the costs of the action.

When a solicitor in the course of litigation has paid fees to counsel, the sums so paid become part of the costs of the action, and if the client on whose behalf they have been paid succeeds, and is awarded costs, he may recover such fees, if allowed on taxation, from the opposite party; but if the client does not so recover the fees, he is still liable to his solicitor for their amount, subject to taxation (*l*).

Payment of fees.

655. The reason of the rule that barristers cannot sue for their fees is that their emoluments are not to depend upon the event of the cause, and their compensation is to be the same whether the event be successful or unsuccessful. Fees are payable as a matter of honour. Counsel may refuse to accept a brief if the fee is not paid when the brief is delivered. That is the remedy of the counsel, and if he does not choose to insist on payment of his fees with his brief, the payment becomes a matter of honour, not of legal obligation (*m*).

The usual mode of acknowledging the payment of fees is for counsel to write on the brief, under or across the amount of the fees, his initials, if he is a King's Counsel, and his signature, if he is a junior, with the date of the payment (*n*). Such an acknowledgment is a receipt for money within sect. 101 of the Stamp Act, 1891 (*o*), and, if the amount acknowledged is £2 or upwards, it requires a receipt stamp (*p*). Such or a similar acknowledgment is required before counsel's fee can be allowed on taxation (*q*). If counsel gives such an acknowledgment when the fee has not in fact been paid, and the solicitor thereby obtains from the opposite party the amount of counsel's fees, the act is on both sides so irregular that the court will not interfere at the instance either of client or of counsel to compel the solicitor to pay the fees

(5 November, 1901). See Annual Statement of the General Council of the Bar, 1899-1900, p. 12; 1901-2, p. 13. As to settlement of disputes between barristers and solicitors by the Chairman of the General Council of the Bar and the President of the Law Society, see Annual Statement of the General Council of the Bar, 1907-8, p. 23.

(*i*) *Re Hall* (1856), 2 Jur. (N. S.) 1076; *Ex parte Colquhoun, Re Clift* (1890), 38 W. R. 688. See further, title BANKRUPTCY AND INSOLVENCY, p. 209, *ante*.

(*k*) See (1884), 19 L. J. 309.

(*l*) *Morris* v. *Hunt* (1819), 1 Chit. 544, 551; *Hobart* v. *Butler* (1859), 9 I. C. L. R. 157, 166. But he is not liable for the fees paid to a particular counsel whom he has instructed his solicitor not to brief (*Re Harrisson*, [1908] 1 K. B. 282. See note (*f*), p. 406, *post*). See further title SOLICITORS.

(*m*) *Morris* v. *Hunt, supra*. See *Re Le Brasseur and Oakley*, [1896] 2 Ch 487, *per* LINDLEY, L.J., at p. 494; *Re Cockayne* (1884), 19 L. J. 500.

(*n*) See (1883), 18 L. J. 642.

(*o*) 54 & 55 Vict. c. 39.

(*p*) *General Council of the Bar (England)* v. *Inland Revenue Commissioners*, [1907] 1 K. B. 462.

(*q*) R. S. C., Ord. 65, r. 27 (52).

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to counsel (*r*). Counsel so acting is guilty of a breach of professional etiquette (*s*).

SUB-SECT. 2.—*Incapacity of Counsel and Client to Contract.*

Counsel incapable of suing for fees.

656. The employment of a barrister is a purely honorary one in the sense that it confers on him no legal right to remuneration for his services; hence the remuneration of a barrister is called *honorarium*, as opposed to *merces* (*a*). A barrister is, however, at liberty in exceptional and special circumstances to accept a brief on the terms that he is to receive no fee at all in respect of it (*b*).

Bargain for fees to follow the event.

A bargain that fees should be paid to counsel according to the event of a suit is illegal, and exposes both the parties to the penalties of maintenance (*c*). A bargain securing to a barrister a share in the proceeds of the litigation in which he is engaged as counsel is void for champerty, and any security given for the performance of such a bargain is liable to be set aside (*d*).

Promise of client to pay fees not binding.

657. An express promise by the client himself to pay fees to counsel for his advocacy, whether made before or during or after the litigation, has no binding effect (*e*). The relation of counsel and client renders the parties mutually incapable of making any legal contract of hiring and service concerning advocacy in litigation (*f*). The requests and promises of the client and the services of counsel create neither an obligation nor an inception of obligation, nor any inchoate right whatever capable of being completed and made into a contract by any subsequent promise (*g*).

If a client conveys property to counsel in consideration of his services as counsel and of the promise of the client to pay for them, the promise of the client to pay counsel is insufficient to support the deed as founded on contract (*h*); such a deed cannot be upheld as having been executed in the fair performance of a moral obligation, for no moral obligation rests upon the client to remunerate counsel in any other than the ordinary way (*i*). Where a barrister who had rendered professional services to a client for which he had not been paid, and who had lent money to his client on a mortgage, inserted in the mortgage deed a promise by the mortgagor to pay, when the mortgage was redeemed, six months' interest over and above what should then be due, the pretence for the promise being

(*r*) *Angell* v. *Oodeen* (1860), 29 L. J. (C. P.) 227; *Re Cockayne* (1884), 19 L. J. 500; *Re Hickie* (1868), 1 I. L. T. 795. See *Hobart* v. *Butler* (1859), 9 I. C. L. R. 157.

(*s*) Annual Statement of the General Council of the Bar, 1901-2, p. 6.

(*a*) Davies' Reports, Preface; Co. Litt. 295 a; Bl. Com. iii. 28; *Thornhill* v. *Evans* (1742), 2 Atk. 330, *per* Lord HARDWICKE, L.C., at p. 332; *Mostyn* v. *Mostyn* (1870), 5 Ch. App. 457.

(*b*) See p. 386, *ante*.

(*c*) *Penrice* v. *Parker* (1673), Finch, 75. As to maintenance, see title ACTION, Vol. I., p. 51; and p. 379, *ante*.

(*d*) *Skapholme* v. *Hart* (1680), Finch, 477. As to champerty, see title ACTION, Vol. I., p. 53.

(*e*) *Kennedy* v. *Broun* (1863), 13 C. B. (N. S.) 677.

(*f*) *Ibid.*

(*g*) *Ibid.*

(*h*) *Broun* v. *Kennedy* (1864), 33 L. J. (CH.) 71, and, on appeal, 342.

(*i*) *Ibid.*, *per* Lord ROMILLY, M.R., at p. 78.

that the mortgagor had agreed to pay the extra interest in return for the barrister's professional services, the mortgagor was relieved from his promise to pay the extra interest, on the ground that it was "a clandestine way of coming at fees" for which the barrister had no right of action (*k*).

Solicitor's promise to pay not binding on client.

As the client can make no binding contract with counsel to pay his fees, it follows that a solicitor has no authority to make such a promise, and that neither a promise by a solicitor nor a part payment of fees by him will bind the client (*l*).

Extent of incapacity.

658. The rule which prevents a barrister from suing for his fees is not confined to litigation, but extends to all work done by a barrister as a barrister (*m*). The rule also applies to work done outside England by an English barrister as a barrister. Neither in the English nor in the foreign courts can an English barrister sue for such fees, for in any such action the client has a conclusive defence on the ground that the barrister has been employed as a member of the English bar, and, by necessary implication, upon the same terms with reference to remuneration as those upon which members of the English bar are understood to practise in England (*n*).

Non-professional work.

The rule relates only to business which is within the ordinary scope of the practice of a barrister (*o*). As regards other work, *e.g.*, work done as a returning officer at an election, a barrister can contract and sue for his remuneration (*p*). It is not clear whether a barrister who acts as arbitrator can recover his fees by action on either an express or an implied promise (*q*). A barrister who has taken evidence under a commission is justified in declining to produce the evidence until his fees for taking it are paid (*r*).

It seems that counsel has no lien on papers left with him (*s*).

Obligation to accept briefs.

659. A barrister is under an obligation to accept a brief in the courts in which he professes to practise at a proper professional fee, unless there are special circumstances which justify his refusal to accept a particular brief (*t*). But though by accepting a brief he undertakes a duty, he does not enter into any contract, express or implied (*a*). The principle which prevents a barrister from suing the client for his fees, *i.e.*, the mutual incapacity of counsel and client

(*k*) *Thornhill* v. *Evans* (1742), 2 Atk. 330, *per* Lord HARDWICKE, L.C., at p. 332.

(*l*) *Hobart* v. *Butler* (1859), 9 I. C. L. R. 157; *Mostyn* v. *Mostyn* (1870), 5 Ch. App. 457. See title BANKRUPTCY AND INSOLVENCY, p. 209, *ante*.

(*m*) *Mostyn* v. *Mostyn*, *supra*.

(*n*) *R.* v. *Doutre* (1884), 9 App. Cas. 745, *per* Lord WATSON, at p. 752.

(*o*) See p. 370, *ante*.

(*p*) *Egan* v. *Guardians of the Kensington Union* (1841), 3 Q. B. 935, n.

(*q*) *Crampton and Holt* v. *Ridley & Co.* (1887), 20 Q. B. D. 48, *per* A. L. SMITH, J., at p. 52. See further title ARBITRATION, Vol. I., p. 473.

(*r*) *Smith* v. *Hallen* (1861), 2 F. & F. 678.

(*s*) See *Steadman* v. *Hockley* (1846), 15 M. & W. 553; *Re Williams* (1861), 9 W. R. 393. As to counsel's rights to drafts, see *Stanhope* v. *Roberts* (1741), 2 Atk. 214.

(*t*) Annual Statement of the General Council of the Bar, 1903–4, p. 15.

(*a*) *Swinfen* v. *Lord Chelmsford* (1860), 29 L. J. (EX.) 382.

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to contract with reference to the services of counsel, also prevents the client from suing counsel (*b*).

No liability for negligence etc.

If a barrister acts honestly in the discharge of his duty, he is not liable to an action by his client for negligence, or for want of skill, discretion, or diligence in respect of any act done in the conduct of a cause, or in settling drafts, or in advising. If a barrister accepts a brief in a cause and receives payment of his fees, but does not attend at the trial, no action can be brought against him to recover either the fees (*c*), or damages for non-attendance (*d*). No action is maintainable against a barrister for unskilfully drawing pleadings (*e*), or for compromising an action without the authority of the client (*f*). The law requires of counsel nothing but the honest discharge of his duty to the best of his judgment; and if he means what he does to be for the benefit of his client, he is not responsible to his client for anything he does (*g*). This immunity from action is not confined to litigation, but extends to all cases where the relation of counsel and client exists (*h*).

SUB-SECT. 3.—*Confidential Position of Counsel.*

Duty of secrecy.

660. The employment of counsel places him in a confidential position, and imposes upon him the duty not to communicate to any third person the information which has been confided to him as counsel, and not to use either such information or his position as counsel to his client's detriment (*i*). This duty continues after the relation of counsel and client has ceased.

Enforced by legal process.

The courts will interfere by injunction to prevent counsel from disclosing the secrets of the client, and will set aside any deed or transaction by which a barrister has, through making use of the confidence reposed in him, gained an advantage to himself to the detriment of his client (*k*).

Misuse of knowledge acquired as counsel.

Where a barrister had acted as counsel and confidential adviser to his client, and had thus acquired an intimate knowledge of his affairs and of certain doubtful charges on his property, on which charges he had himself professionally advised, and, after ceasing to be counsel for him, used the knowledge thus acquired to buy up the doubtful charges at a low price, and to defeat negotiations for their compromise, of which he was aware and in which at one time he

(*b*) *Robertson* v. *Macdonogh* (1880), 6 L. R. Ir. 433.

(*c*) *Turner* v. *Philipps* (1792), Peake, 122. Where a barrister accepts a brief upon an express undertaking that he will personally attend throughout the case, he ought, if he does not so attend, to return his fee (Annual Statement of the General Council of the Bar, 1898–9, p. 9).

(*d*) *Robertson* v. *Macdonogh*, *supra*; *Mulligan* v. *M'Donagh* (1860), 2 L. T. 136.

(*e*) *Fell* v. *Brown* (1791), Peake, 96.

(*f*) *Swinfen* v. *Lord Chelmsford* (1859), 1 F. & F. 619; (1860) 29 L. J. (EX.) 382.

(*g*) *Ibid.* See *Purves* v. *Landell* (1845), 12 Cl. & Fin., *per* Lord CAMPBELL, at p. 102.

(*h*) *Perring* v. *Rebutter* (1842), 2 Moo. & R. 429. As to the criminal liability of counsel for acts done by him as counsel, see *Whitelocke's Case* (1613), 2 State Tr. 766; *R.* v. *Cook* (1660), 5 State Tr. 1078, 1091; *Case of Privilege of Parliament* (1675), 6 State Tr. 1146.

(*i*) See *Carter* v. *Palmer* (1839), 1 Dr. & Wal. 722, *per* Lord PLUNKETT, L.C., at p. 743, affirmed in H. L. (1842), 8 Cl. & Fin. 657; *R.* v. *Walker* (circ. 1668), Tremaine's Pleas of the Crown, 261; 2 Hawk. P. C., bk. 2, c. 22, s. 30.

(*k*) *Carter* v. *Palmer*, *supra*.

was professionally engaged, the barrister was held to be a trustee for his former client of the charges so purchased (*l*). Where a barrister obtained from a client the grant of a stewardship of a manor "in fee" without explaining to the client the meaning of the words "in fee," the barrister was ordered to give up the grant (*m*). Where a barrister drew a will for a client in which the barrister was appointed sole executor, and there was no disposition of personalty, the effect of which in the then state of the law was that the personalty passed to the barrister absolutely, an effect of which the barrister stated he was ignorant, it was held that, though there was no imputation on the barrister's character, yet his duty was to have informed his client of the legal effect of the will, and that, having been consulted as a lawyer, he could not set up his ignorance of law as a defence, and that he could not be allowed to retain the personalty for his own benefit, and he was declared trustee of it for the next of kin of the testator (*n*). If a client, being under the influence of counsel, executes a deed in favour of counsel, the deed is liable to be set aside on the ground of undue influence. If there is such undue influence existing when the deed is executed, it is immaterial that the relation of counsel and client had then ceased (*o*).

Where there is no undue influence, a deed executed by a client in favour of his counsel may stand as a voluntary instrument, and is not void on grounds of public policy (*p*).

Duty to refuse briefs in certain cases.

661. Counsel ought not to appear for two clients whose interests may conflict (*q*). Counsel ought not to accept a brief against a party, even though the party refuse to retain him, in any case in which he would be embarrassed in the discharge of his duty by reason of confidence reposed in him by that party (*r*).

Communications to and by counsel privileged.

662. Confidential communications passing between client, solicitor, and barrister in a professional capacity for the sake of obtaining legal advice, such as cases for the opinion of counsel and his advice thereon, are privileged from disclosure. The Court will not, at the instance of a stranger, allow the professional adviser, and will not compel the client, to give evidence of such communications when oral, and will not order discovery of them when written. The privilege is not confined to such communications as are made in the course of or in anticipation of litigation, but extends to all professional communications of a confidential character made for the purpose of obtaining legal advice (*s*). But

(*l*) *Carter* v. *Palmer* (1839), 1 Dr. & Wal. 722, affirmed (1842), 8 Cl. & Fin. 657.

(*m*) *Thornhill* v. *Evans* (1742), 2 Atk. 330.

(*n*) *Segrave* v. *Kirwan* (1828), Beat. 157. See *Campbell* v. *Corley* (1857), 1 De G. & J. 238.

(*o*) *Broun* v. *Kennedy* (1864), 33 L. J. (CH.) 71, 342.

(*p*) *Leslie* v. *Verschoyle* (1815), Beat. 535.

(*q*) See *Day* v. *Ponsonby* (1842), 5 I. Eq. R. 24; *Re Burton*, [1901] W. N. 202.

(*r*) *Earl Cholmondeley* v. *Lord Clinton* (1815), 19 Ves. 261, 274. See Retainer Rules, Yearly Practice, 1908, ii. 1497—1500; and p. 407, *post*.

(*s*) *Waldron* v. *Ward* (1654), Sty. 449; *Bolton* v. *Corporation of Liverpool* (1833), 1 My. & K. 88; *Knight* v. *Marquess of Waterford* (1836), 2 Y. & C. (EX.) at p. 30; *Nias* v. *Northern and Eastern Rail. Co.* (1838), 3 My. & Cr. 355; *Clagett* v

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the communications must be professional: an opinion given by a barrister as a friend is not privileged from disclosure (*t*); and the communications must be of a confidential character (*a*). The privilege does not extend to communications made for the purpose of committing a fraud or a crime (*b*). Pleadings and counsel's indorsement on his brief are *publici juris* and not confidential communications, but drafts of pleadings are privileged; observations, notes, and marks made by counsel on his brief are also privileged and may be sealed up, if inspection of the indorsement is ordered (*c*). The fact of the retainer of counsel is not privileged (*d*).

Waiver of privilege.

The privilege is the privilege of the client and not of the professional adviser, and may be waived by the client, but unless waived by him or his successors in title never ceases at any time (*e*).

Counsel as witness.

663. It is doubtful whether a person who appears as counsel can give evidence in the same proceeding (*f*); such a course is very unusual. In subsequent proceedings counsel can, if he chooses, give evidence of what he has seen or said in court when engaged as counsel (*g*). If counsel is called as a witness by his client, he cannot, it seems, refuse to give evidence (*h*).

Phillips (1842), 2 Y. & C. Ch. Cas. 82; *Combe* v. *Corporation of London* (1842), 1 Y. & C. Ch. Cas. 631; *Holmes* v. *Baddeley* (1844), 1 Ph. 476; *Pearse* v. *Pearse* (1846), 1 De G. & Sm. 12; *Reece* v. *Trye* (1846), 9 Beav. 316; *Penruddock* v. *Hammond* (1847), 11 Beav. 59; *Jenkyns* v. *Bushby* (1866), L. R. 2 Eq. 547; *Carey* v. *Cuthbert* (1872), 6 I. R. Eq. 599; *Minet* v. *Morgan* (1873), 8 Ch. App. 361; *Mostyn* v. *West Mostyn Coal and Iron Co.* (1876), 34 L. T. 531; *Pearce* v. *Foster* (1885), 15 Q. B. D. 114; Manual of Military Law, published by the War Office, 1899, chap. vi., s. 101, p. 100. See further titles DISCOVERY; EVIDENCE.

(*t*) See *Smith* v. *Daniell* (1874), L. R. 18 Eq. 649; *Wilson* v. *Rastall* (1792), 4 Term Rep. 753.

(*a*) *Gardner* v. *Irvin* (1878), 4 Ex. D. 49; *Underwood* v. *Secretary of State in Council for India* (1866), 35 L. J. (CH.) 545.

(*b*) *R.* v. *Cox* (1884), 14 Q. B. D. 153; *Williams* v. *Quebrada Railway Land and Copper Co.*, [1895] 2 Ch. 751; *Rothwell* v. *King* (1674), 2 Swan. 221 n.; *Spencer* v. *Luttrell* (1674), 2 Swan. 221; *Stanhope* v. *Nott* (1674), 2 Swan. 221.

(*c*) *Nicholl* v. *Jones* (1865), 2 Hem. & M. 588; *Re Brown, Tyas* v. *Brown* (1880), 42 L. T. 501; *Plumley* v. *Horrell*, [1868] W. N. 240; *Walsham* v. *Stainton* (1863), 2 Hem. & M. 1; *Calcraft* v. *Guest*, [1898] 1 Q. B. 759.

(*d*) *Forshaw* v. *Lewis* (1855), 1 Jur. (N. S.) 263.

(*e*) *Wilson* v. *Rastall* (1792), 4 Term Rep. 753, *per* BULLER, J., at p. 759; *Calcraft* v. *Guest*, [1898] 1 Q. B. 759. But secondary evidence of any privileged documents may be given (*ibid.*).

(*f*) *Stones* v. *Byron* (1846), 4 Dow. & L. 393; *Deane* v. *Packwood* (1847), 4 Dow. & L. 395, n.; but see *Eastland* v. *Burchell* (1878), 3 Q. B. D. at p. 436; *Guinea's Case* (1841), Ir. Circ. Ca. 167.

(*g*) *Brown* v. *Foster* (1857), 1 H. & N. 736; *Curry* v. *Walter* (1796), 1 Esp. 456, where it was held that a barrister cannot be compelled under subpœna to give evidence as to what had been stated by him on a former motion before the Court.

(*h*) See *Guinea's Case, supra.* In several cases counsel have, at the request of their clients, made statements in court as to negotiations for the settlement of disputes and as to the circumstances in which they have consented to the compromise of an action. The correct course is for counsel to make the statement from their places at the bar without being sworn (*Baillie's Case* (1778), 21 State Tr. 340; *Hickman* v. *Berens*, [1895] 2 Ch. 638 at p. 641; *Kempshall* v. *Holland* (1895), 14 R. 336). In *Wilding* v. *Sanderson*, [1897] 2 Ch. 534, at p. 539, the statements were made on oath; but see *Iggulden* v. *Terson* (1833), 2 Dowl. 277.

Counsel raised to the bench.

664. If counsel who has advised on or been engaged in a case is raised to the bench, and the same case comes before him, the practice is for him to refuse to adjudicate on it (*i*).

SUB-SECT. 4.—*Authority of Counsel.*

Instruction of counsel.

665. When counsel appears in court and states that he is instructed, the court will not inquire into his authority to appear (*k*), except when different counsel appear for the same party instructed by different solicitors, when the court will inquire into the authority of the solicitors (*l*). The mere giving of a retainer (*m*) confers no authority upon counsel; in order to authorise him to take any step in an action a brief must be delivered (*n*).

Conduct of case not to be shared with client.

666. If counsel is instructed, he ought to have control over the case and conduct it throughout (*o*). His authority may be limited by the client, but only to a certain extent; and it is not becoming for him to accept a brief limiting the ordinary authority of counsel in this respect, or to take a subordinate position in the conduct of a case, or to share it with the client (*p*), even if the litigant is himself a barrister; the litigant must elect either to conduct the case entirely in person or to intrust the case entirely to his counsel (*q*). If a litigant instructs counsel, the litigant cannot himself be heard, unless he revokes his counsel's authority and himself assumes the conduct of the case (*r*), and when a case is fairly before the court and counsel is seised of it, his authority cannot be revoked (*s*).

(*i*) See *Thellusson* v. *Rendlesham* (1859), 7 H. L. Cas. at p. 430; *Phillips* v. *Headlam* (1831), 2 B. & Ad. at p. 385; *Lewis* v. *Branthwaite* (1831), 2 B. & Ad. at p. 445.

(*k*) *Murphy* v. *Richardson* (1850), 13 I. L. R. 430. See *Doe* d. *Bennett* v. *Hale* (1850), 15 Q. B. 171.

(*l*) *Butterworth* v. *Clapham* (1820), 1 Jac. & W. 673, n.; *Re London and Manchester Direct Independent Rail. Co.* (1849), 18 L. J. (CH.) 245, 247.

(*m*) As to retainers, see p. 403, *post*.

(*n*) *Ahitbol* v. *Benedetto* (1810), 3 Taunt. 225; *Doe* d. *Crake* v. *Brown* (1832), 5 C. & P. 315.

(*o*) *Moscatti* v. *Lawson* (1835), 1 Moo. & R. 454, *per* ALDERSON, B.

(*p*) *Strauss* v. *Francis* (1866), L. R. 1 Q. B. 379, 381, 383; *Moscatti* v. *Lawson supra*; *Shuttleworth* v. *Nicholson* (1835), 1 Moo. & R. 254; *R.* v. *Parkins* (1824), Ry. & M. 166; *R.* v. *White* (1811), 3 Camp. 98; *Longworth* or *Yelverton* v. *Yelverton* (1867), L. R. 1 Sc. & Div. 218; *R.* v. *Redhead* (1795), 25 State Tr. at p. 1021.

(*q*) *New Brunswick and Canada Railway and Land Co.* v. *Conybeare* (1862), 9 H. L. Cas. 711, *per* Lord WESTBURY, L.C., at p. 719; *Newton* v. *Chaplin* (1850), 19 L. J. (C. P.) 374; *Newton* v. *Ricketts* (1848), 2 Ph. 624. A barrister litigant who is conducting his own case should not appear in forensic costume or speak from the places reserved for counsel. It is doubtful whether he has the right to do either, see *Newton* v. *Chaplin*, *supra*, *per* WILDE, C.J., at p. 376; *R.* v. *Atkins* (1682), 3 Mod. Rep. at p. 4; but see *Neate* v. *Denman* (1874), L. R. 18 Eq. 127, *per* HALL, V.-C., at p. 135.

(*r*) *Parkinson* v. *Hanbury* (1867), L. R. 2 H. L. at p. 6. See *R.* v. *Maybury* (1865), 11 L. T. 566.

(*s*) *R.* v. *Maybury*, *supra*. As regards appeals on points of law, if counsel has satisfied himself that he has no argument to offer in support of his case, he ought at once to say so and retire altogether, unless he has express instructions to the contrary (*Earl of Beauchamp* v. *Madresfield* (1872), L. R. 8 C. P. 245, *per* BRETT, J., at p. 253).

SECT. 6. **Counsel and Client.**

When counsel's consent is binding on client.

A judgment obtained by consent of counsel in court (*t*), in a matter within counsel's authority, cannot form the subject of an appeal (*a*). If counsel, with his client's authority and consent, agrees to an order, and there is no mistake or surprise, the client cannot arbitrarily withdraw his consent (*b*), but if the counsel subsequently informs the court that he agreed under misapprehension, the court will not hold him or his client to the agreement (*c*).

Authority to compromise.

667. The authority of counsel at the trial of an action extends, when it is not expressly limited, to the action and all matters incidental to it and to the conduct of the trial (*d*), such as withdrawing the record or a juror, calling or not calling witnesses (*e*), consenting to a reference (*f*), or a *stet processus* (*g*), or a verdict (*h*), undertaking not to appeal (*i*), or on the hearing of a motion for a new trial consenting to the reduction of damages (*k*).

Compromise binding on client even without his consent.

The consent of the client is not needed for a matter which is within the ordinary authority of counsel, and if a compromise is entered into by counsel in the absence of the client, the client is bound. Thus, where in an action for malicious prosecution the defendant's counsel, in his client's absence and without any express authority, consented to a verdict for the plaintiff with costs, and to a withdrawal of all imputations against the plaintiff, it was held that the settlement was within the apparent general authority of counsel and was binding on the client (*l*). If an action is settled in court in the presence of the client, his consent will be inferred, and he will not be heard to say that he did not understand what was going on (*m*). So when an arrangement was suggested, and the client's solicitor went and consulted the client, who was not in court, and returned, and afterwards the suggested arrangement was concluded by counsel, the consent of the client was inferred (*n*).

(*t*) As to compromise by counsel out of court, see *Green* v. *Crockett* (1865), 34 L. J. (CH.) 606.

(*a*) *Downing* v. *Cage* (1699), 1 Eq. Cas. Abr. 165 ; *Harrison* v. *Rumsey* (1752), 2 Ves. Sen. 488 ; *Bradish* v. *Gee* (1754), 1 Keny., *per* Lord HARDWICKE, L.C., at p. 76.

(*b*) *Holt* v. *Jesse* (1876), 3 Ch. D. 177; *Harvey* v. *Croydon Union Rural Sanitary Authority* (1884), 26 Ch. D. 249.

(*c*) *Harvey* v. *Croydon Union Rural Sanitary Authority*, *supra* ; *Holt* v. *Jesse*, *supra* ; *Neale* v. *Gordon-Lennox*, [1902] A. C. 465, *per* Lord LINDLEY, at p. 473.

(*d*) *Swinfen* v. *Lord Chelmsford* (1860), 29 L. J. (EX.) 382 ; *Hatch* v. *Lewis* (1861), 2 F. & F. 467 ; *Wallace* v. *Cook* (1903), *Times* (15 June, 1903).

(*e*) *Chambers* v. *Mason* (1858), 5 C. B. (N. S.) 59 ; *Strauss* v. *Francis* (1866), L. R. 1 Q. B. 379.

(*f*) *Filmer* v. *Delber* (1811), 3 Taunt. 486 ; *Faviell* v. *Eastern Counties Rail. Co.* (1848), 2 Exch. 344; *Smith* v. *Troup* (1849), 7 C. B. 757.

(*g*) *Rumsey* v. *King* (1876), 33 L. T. 728.

(*h*) *Matthews* v. *Munster* (1887), 20 Q. B. D. 141; *Prestwich* v. *Poley* (1865), 18 C. B. (N. S.) 806 ; *Chown* v. *Parrott* (1863), 32 L. J. (C. P.) 197.

(*i*) *Re West Devon Great Consols Mine* (1888), 38 Ch. D. 51 ; but see *Rhodes* v. *Swithenbank* (1889), 22 Q. B. D. 577.

(*k*) *Thomas* v. *Harris* (1858), 27 L. J. (EX.) 353.

(*l*) *Matthews* v. *Munster*, *supra*.

(*m*) *Chambers* v. *Mason*, *supra*.

(*n*) *Porter* v. *Cooper* (1834), 1 Cr. M. & R. 387.

668. Questions of difficulty have arisen where the authority of counsel has been expressly limited by the client, and counsel has consented to an order or judgment in spite of the dissent of the client, or on terms differing from those which the client authorised (*o*). If the limitation of authority is communicated to the other side, consent by counsel outside the limits of his authority would be of no effect (*p*).

Limitation of authority by client.

The position is more uncertain where the authority of counsel is limited, but the limitation is unknown to the other side, who enter into the compromise believing that the opponent's counsel has the ordinary unlimited authority. In some cases, where the matter is within the ordinary authority of counsel, the courts have refused to inquire whether there was any such limitation, when it was not communicated to the other side (*q*), and have refused to set aside a compromise entered into by counsel (*r*).

But the true rule seems to be that in such cases the court has power to interfere; that it is not prevented by the agreement of counsel from setting aside or refusing to enforce a compromise; that it is a matter for the discretion of the court; and that when, in the particular circumstances of the case, grave injustice would be done by allowing the compromise to stand, the compromise may be set aside, even although the limitation of counsel's authority was unknown to the other side (*s*). Thus, where the plaintiff in an action of libel had agreed to her counsel referring the action, on the condition that all imputations on her character were withdrawn in open court, and the plaintiff's counsel agreed with the defendant's counsel, who had no knowledge of the condition, to an order of reference and made no stipulation as to the withdrawal of the imputations, the House of Lords held that, as the order was made not only without the plaintiff's consent, but in spite of her express instructions, her counsel could not bind the court by acting without authority and in contradiction to what his client had said, and that for her to be deprived by his unauthorised act of the opportunity of vindicating her character in public was so gross an injustice that the order of reference ought to be set aside (*t*).

Setting aside compromise in excess of authority.

669. The authority of counsel to compromise is limited to the issues in the action; and a compromise by counsel affecting collateral matters will not bind the client, unless he expressly assents (*a*).

Extent of counsel's authority.

(*o*) See *Scheyer* v. *Wontner* (1890), 90 L. T. Jo. 116.

(*p*) *Strauss* v. *Francis* (1866), L. R. 1 Q. B. 379, *per* BLACKBURN, J., at p. 382.

(*q*) *Re Hobler* (1844), 8 Beav. 101; *Mole* v. *Smith* (1820), 1 Jac. & W., *per* Lord ELDON, L.C., at p. 673; *Chambers* v. *Mason* (1858), 5 C. B. (N. S.) 59.

(*r*) *Filmer* v. *Delber* (1811), 3 Taunt. 486; *Wright* v. *Soresby* (1834), 2 Cr. & M. 671; *Lynch* v. *Cowell* (1865), 12 L. T. 548; *Strauss* v. *Francis*, *supra*; *Rumsey* v. *King* (1876), 33 L. T. 728.

(*s*) *Neale* v. *Gordon-Lennox*, [1902] A. C. 465.

(*t*) *Ibid.*, *per* Lord HALSBURY, L.C., at pp. 470, 472, and *per* Lord LINDLEY, at p. 473.

(*a*) *Swinfen* v. *Swinfen* (1856), 18 C. B. 485, affirmed (1857), 1 C. B. (N. S.) 364; (1857), 27 L. J. (CH.) 35, affirmed on appeal (1858), *ibid.*, 491; *Swinfen* v. *Lord Chelmsford* (1860), 29 L. J. (EX.) 382; *Ellender* v. *Wood* (1888), 32 Sol. Jo. 628; *Kempshall* v. *Holland* (1895), 14 R. 336; *Thomas* v. *Hewes* (1834), 2 Cr. & M.

SECT. 6. Counsel and Client.

Thus, where in a suit in Chancery an order was made for the trial at assizes of an issue as to the validity of a will under which the plaintiff claimed an estate, and counsel for the plaintiff, in her absence and without any express authority from her, agreed in court to a compromise on the terms that a juror should be withdrawn, that the estate should be conveyed by the plaintiff to the defendant in fee, and that the defendant should secure an annuity to the plaintiff, it was held that the compromise did not bind the client, and that her counsel had no authority to enter into it without express instructions from her (*b*).

When compromise not binding.

670. Apart from the cases in which a compromise entered into by counsel in excess of his authority will not be enforced (*c*), any order or judgment made by consent may, generally speaking, be set aside upon any ground which would invalidate an agreement between the parties (*d*).

Mistake.

A compromise by counsel will not bind the client, if counsel is not apprised of facts the knowledge of which is essential in reference to the question on which he has to exercise his discretion, *e.g.*, that the terms accepted had already been rejected by the client (*e*). Where counsel enters into a compromise in intended pursuance of terms agreed upon between the clients, and the compromise, owing to a misunderstanding, fails to carry out the intentions of one side, the compromise does not bind the client, and the court will allow the consent to be withdrawn (*f*). Where counsel, acting upon instructions to compromise, consents under a misunderstanding to certain terms which do not carry into effect the intentions of counsel, and the terms are thought by one party to be more extensive than the other party intends them to be, there is no agreement on the subject-matter of the compromise, and the court will set it aside (*g*). But a person who has consented to a compromise will not be allowed to withdraw his consent, because he subsequently discovers that he has a good ground of defence (*h*).

Duress.

If counsel, acting for a client who is alleged to be a lunatic but believing the client to be of sound mind, consents to certain terms for the withdrawal of lunacy proceedings against the client, and so consents influenced by fear of the inconvenience and disease likely to arise to his client from confinement, counsel's consent ought to be considered as enforced by duress, and the client will not be bound (*i*).

519. See *Elworthy* v. *Bird* (1824), 13 Price, 222; (1824), 9 Moo. 430; (1825), 2 Sim. & St. 372; (1829), Taml. 38.

(*b*) *Swinfen* v. *Swinfen* (1856), 18 C. B. 485, affirmed (1857), 1 C. B. (N. S.) 564.

(*c*) See p. 399, *ante*.

(*d*) *Huddersfield Banking Co.* v. *Henry Lister & Son*, [1895] 2 Ch. 273; *Wilding* v. *Sanderson*, [1897] 2 Ch. 534. See *Turner* v. *Green*, [1895] 2 Ch. 205; *Windhill Local Board of Health* v. *Vint* (1890), 45 Ch. D. 351; *A.-G.* v. *Tomline* (1877), 7 Ch. D. 388; *Neale* v. *Gordon-Lennox*, [1902] A. C. 465.

(*e*) *Furnival* v. *Bogle* (1827), 4 Russ. 142.

(*f*) *Lewis's* v. *Lewis* (1890), 45 Ch. D. 281; but compare *Wedge* v. *Panter* (1908), 124 L. T. Jo. 335.

(*g*) *Hickman* v. *Berens*, [1895] 2 Ch. 638. See *Wilding* v. *Sanderson*, *supra*.

(*h*) *Elsas* v. *Williams* (1884), 52 L. T. 39.

(*i*) *Cumming* v. *Ince* (1847), 11 Q. B. 112, 120.

A compromise or order made by consent of counsel for an infant or other person under disability is not binding on the client, unless it is sanctioned by the court as being for the benefit of the client (*k*).

Infancy.

671. The statements of counsel, if made on the trial of an action or in the course of any interlocutory proceeding in the presence of the client or his solicitor or someone authorised to represent the solicitor, and not repudiated at the time, bind the client, and may be used as evidence against him (*l*). But, though the solicitor admitted to prosecute or defend an action represents his client throughout the cause, counsel represents the client only when he is in court. Consequently a communication made to counsel out of court by the adverse solicitor or party, or a statement made by counsel out of court, has not the same effect as a communication made to or proceeding from the solicitor who instructs counsel (*m*).

Statements by counsel binding on client.

A special case signed by counsel is, as against the parties for whom counsel acts, an admission of the facts therein stated, and may be used in subsequent proceedings between the same parties as evidence of such facts (*n*).

Special case.

672. In non-litigious matters the acts of counsel can only bind the client, when counsel has express authority or when his acts are adopted by the client (*o*). In negotiations for the purchase of property the conditional approval of the title by counsel for the purchaser on an abstract being laid before him does not amount to a waiver of all objections to the title (*p*). But if counsel for a purchaser waives the production of a particular document stated in the abstract to be lost, and the purchaser adopts the opinion of counsel and continues to deal with the vendor, the purchaser will not afterwards be permitted to repudiate the waiver (*q*).

Non-litigious matters.

SUB-SECT. 5.—*Effect of acting under Counsel's Advice.*

673. A solicitor is not liable to his client for the absence, neglect, or want of attention of counsel whom he instructs (*r*). Nor is he

When counsel's advice protects solicitor.

(*k*) *Rhodes* v. *Swithenbank* (1889), 22 Q. B. D. 577; *Turner* v. *Turner* (1852), 2 De G. M. & G. 28; *Biddell* v. *Dowse* (1827), 6 B. & C. 255; *Rossborough* v. *Boyse* (1854), 3 I. Ch. R. 540. But see *Knipe* v. *M'Mahon* (1843), 4 Dr. & War. 295; *Mole* v. *Smith* (1820), 1 Jac. & W., *per* Lord ELDON, L.C., at p. 673.

(*l*) *Colledge* v. *Horn* (1825), 3 Bing. 119; *Duncombe* v. *Daniell* (1837), 8 C. & P. 222; *Haller* v. *Worman* (1861), 3 L. T. 741. See also *Kelly* v. *Bushby* (1835), 3 Knapp, 375; *Mahony* v. *Mahony* (1850), 2 Ir. Jur. 129. But see *Machell* v. *Ellis* (1845), 1 Car. & Kir. 682.

(*m*) *Richardson* v. *Peto* (1840), 1 Man. & G. 896. See Pollock and Maitland, Hist. of Eng. Law, 2nd ed. i. 212, 213. See generally, as to statements made in the course of litigation, titles EVIDENCE; PRACTICE AND PROCEDURE.

(*n*) *Van Wart* v. *Wolley* (1823), Ry. & M. 4; *Edmunds* v. *Newman* (1823), Ry. & M. 5.

(*o*) As to notice of an instrument which comes to the knowledge of counsel, see Conveyancing Act, 1882 (45 & 46 Vict. c. 39), s. 3; and title SALE OF LAND.

(*p*) *Deverell* v. *Lord Bolton* (1812), 18 Ves. 505; *M'Culloch* v. *Gregory* (1855), 1 K. & J. 286; *Alexander* v. *Crosby* (1844), 1 Jo. & Lat. 666.

(*q*) *Alexander* v. *Crosby*, *supra*.

(*r*) *Lowry* v. *Guilford* (1832), 5 C. & P. 234. But merely to hand a brief to counsel is not to instruct him. The solicitor himself or some competent clerk must be

SECT. 6. Counsel and Client.

answerable for error in judgment upon points such as are usually intrusted to counsel, *e.g.*, the sufficiency of the evidence of a document, but on a matter where the law would presume him to have knowledge he cannot relieve himself of responsibility by consulting counsel (*s*). A solicitor is sometimes justified in acting on the advice of counsel in opposition to the wishes of his client; *e.g.*, where a client wished his solicitor to insert a number of letters in an affidavit, and counsel, deeming them irrelevant, declined to insert them, the solicitor was held not liable (*t*). The question of calling or not calling witnesses at a trial is one entirely for counsel (*a*). Thus where counsel did not call certain witnesses, and the client sued the solicitor for negligence, it was held that the solicitor was not liable (*b*). The drafting of pleadings is also a matter which generally falls within the province of counsel, and a solicitor is not liable for negligence for proceeding with an action, which ultimately fails owing to an error of pleading, when the pleading is drawn by counsel (*c*). On a matter where there is reasonable doubt, and where there is no want of ordinary care and knowledge on the part of the solicitor, and he acts under the advice of counsel, the solicitor is not liable to the client (*d*). But if a solicitor does not supply counsel with instructions as to material facts of which the solicitor is aware, the opinion of counsel will not protect the solicitor from an action for negligence (*e*).

Protection of client.

674. In an action for a malicious or fraudulent proceeding, the defendant is not excused on the ground that he acted under counsel's opinion, unless he also shows that the case was fairly stated to counsel, and that his advice thereon was obtained *bonâ fide* and properly followed (*f*). The fact that a person in instituting criminal proceedings had previously laid all the facts of the case before counsel and acted *bonâ fide* upon the opinion given is, in an action for malicious prosecution, evidence of reasonable and probable cause (*g*).

The opinion of counsel recommending a purchaser not to accept a title or to accept it only on certain conditions will not protect the

present in court and explain the subject-matter of the brief, and give any information that counsel may require. If a solicitor fails so to instruct counsel, then, though the brief has been delivered and counsel is present at the trial, the solicitor may be liable (*Hawkins* v. *Harwood* (1849), 4 Exch. 503). As to the liability in general of a solicitor to his client, see title SOLICITORS.

(*s*) *Godefroy* v. *Dalton* (1830), 6 Bing. 460, *per* TINDAL, C.J., at p. 469.

(*t*) *Cates* v. *Indermaur* (1858), 1 F. & F. 259.

(*a*) *Wallace* v. *Cook* (1903), *Times* (15 June, 1903).

(*b*) *Hatch* v. *Lewis* (1861), 2 F. & F. 467. See *Hall* v. *Stothard* (1816), 2 Chit. 267.

(*c*) *Manning* v. *Wilkin* (1848), 12 L. T. (o. s.) 249.

(*d*) *Potts* v. *Sparrow* (1834), 6 C. & P. 749.

(*e*) *Ireson* v. *Pearman* (1825), 5 Dow. & Ry. (K. B.) 687.

(*f*) *Andrews* v. *Hawley* (1857), 26 L. J. (EX.) 323. See *Re Clark* (1851), 1 De G. M. & G. 43; *Hewlett* v. *Cruchley* (1813), 5 Taunt. 277. See further, titles MISREPRESENTATION AND FRAUD; MALICIOUS PROSECUTION AND PROCEDURE.

(*g*) *Ravenga* v. *Mackintosh* (1824), 2 B. & C. 693; *Abrath* v. *North Eastern Rail. Co.* (1883), 11 Q. B. D. 440, *per* BRETT, M.R., at p. 455. See further, title MALICIOUS PROSECUTION AND PROCEDURE.

purchaser from costs, if the court should be of opinion that a good title can be made (*h*).

A mistake by counsel, as to the effect of a rule limiting the time for bringing an appeal, is not sufficient ground for granting special leave to appeal (*i*).

Trustees acting under counsel's advice.

If trustees, acting under the advice of counsel, make a wrong payment, they will none the less be ordered to return the money, if they are sued by their *cestui que trust* (*j*). Parties who act in a manner which the court declares to be improper cannot protect themselves by showing that they received bad advice (*k*). Because an action is advised by counsel, it does not follow that it is always and necessarily one which trustees may properly bring; the advice of counsel is not an absolute indemnity to trustees in bringing an action, though it may go a long way towards it (*l*).

In one case where the action of trustees, on the advice of counsel, made a suit by the *cestuis que trust* necessary, and the suit succeeded, the trustees were allowed their costs (*m*). In some cases where trustees have acted under the advice of counsel and have consequently been sued by their *cestuis que trust* and have been unsuccessful, the court has exercised its discretion and refused to make the trustees pay the costs of the successful party (*n*). In other cases where trustees have acted on the advice of counsel and have been sued and been unsuccessful, they have been ordered to pay the costs of the successful party (*o*).

SUB-SECT. 6.—*Retainers.*

Effect of retainer.

675. A retainer is the engagement of a barrister to give his services to a client, and involves the payment of a fee, without which there can be no retainer (*p*). Subject to the rules given below, the acceptance of a retainer binds counsel to accept a brief on behalf of the client who retains him and not to accept a brief from his opponent; and this obligation does not cease upon the counsel being promoted to a higher rank at the bar (*q*).

(*h*) *Maling* v. *Hill* (1785), 1 Cox, Eq. Cas. 186; *Osborne* to *Rowlett* (1880), 13 Ch. D. 774, *per* JESSEL, M.R., at p. 798. Where property is sold by order of the court, and the conveyancing counsel to the court settles the conditions of sale, the conveyancing counsel is the counsel of the vendor, who is liable for any error made by him (*Re Banister* (1879), 12 Ch. D. 131).

(*i*) *Re Coles and Ravenshear*, [1907] 1 K. B. 1, decided on R. S. C., Ord. 58, r. 15; compare *Bulner* v. *Faber*, [1908] W. N. 9, decided under Ord. 64, r. 7.

(*j*) *Re Jackson* (1881), 44 L. T. 467; *Boulton* v. *Beard* (1853), 3 De G. M. & G. 608. But see *Vez* v. *Emery* (1799), 5 Ves. 141, 144. See further, on this point, title TRUSTS AND TRUSTEES.

(*k*) *Peers* v. *Ceeley* (1852), 15 Beav. 209; *Broome* v. *Speak*, [1903] 1 Ch. 586, *per* BUCKLEY, J., at p. 603, *per* COLLINS, M.R., at p. 619, *sub nom. Shepheard* v. *Broome*, [1904] A. C. 342, *per* Lord JAMES OF HEREFORD, at p. 346.

(*l*) *Stott* v. *Milne* (1884), 25 Ch. D., *per* Lord SELBORNE, L.C., at p. 714; but see *Re Beddoe*, *Downes* v. *Cottam*, [1893] 1 Ch., *per* LINDLEY, L.J., at p. 557. See also *Doyle* v. *Blake* (1804), 2 Sch. & Lef., *per* Lord REDESDALE, L.C., at p. 243.

(*m*) *King* v. *King* (1857), 1 De G. & J. 663.

(*n*) *Angier* v. *Stannard* (1834), 3 My. & K. 566; *Devey* v. *Thornton* (1851), 9 Hare, 222, 232; *Ryan* v. *Nesbitt*, [1879] W. N. 100; *Re Cull's Trusts* (1875), L. R. 20 Eq. 561.

(*o*) *Re Knight's Trusts* (1859), 27 Beav. 45, 49; *Firmin* v. *Pulham* (1848), 12 Jur. 410, 411. See further, title TRUSTS AND TRUSTEES.

(*p*) Annual Statement of the General Council of the Bar, 1904–5, p. 11.

(*q*) Retainer Rules, r. 22, Yearly Practice, 1908, ii. 1499; *Lucas* v. *Peacock* (1844), 8 Beav. 1. But see p. 388, *ante*, and note (*g*), p. 404, *post*.

SECT. 6. Counsel and Client.

Decision of questions relating to retainers.

On questions which arise on the subject of retainers the courts have no jurisdiction, all such questions being settled either by the Attorney-General or some leading King's Counsel or by the General Council of the Bar (*r*). These questions are decided according to certain principles, the most important of which are—

(1) A barrister must not exercise any discretion in the selection of the suitor for whom he pleads in the court in which he practises.

(2) A barrister is bound to act for the party by whom he is retained, as long as his services are required, and no longer (*s*).

(3) A barrister ought not to accept a brief against a former client, even if the client refuses to retain him, if the barrister by reason of his former engagement knows of anything which may be prejudicial to the client in the later litigation (*t*).

Rules as to retainers.

676. The practice as regards retainers is regulated by certain rules which were prepared in 1892 by the Bar Committee and approved by the Attorney-General of the day and the Council of the Incorporated Law Society (*u*). It must be pointed out, however, that these rules are rules of etiquette only and not rules of law, and are not binding outside the profession (*a*). The effect of these rules and of the interpretation which has been put upon them by the General Council of the Bar is as follows:—

General retainer.

677. Retainers are either general or special; a general retainer is either ordinary or limited (*b*). An ordinary general retainer applies to the Supreme Court and to the House of Lords (*c*); a limited general retainer applies to those courts to which it is expressed to be limited (*d*). A separate general retainer must be given for the Privy Council (*e*) and also for parliamentary committees (*f*). Subject to the rules, a general retainer lasts for the joint lives of the client and counsel, unless it is forfeited or extinguished (*g*). If counsel who has accepted a general retainer from one party is offered a special retainer or a brief by another party, the party who has given the general retainer is entitled to reasonable notice before the offered special retainer or brief is accepted (*h*). If a special retainer or a brief is offered to counsel by a party other than the party from whom he has accepted

(*r*) *Ex parte Elsee, Re Joiner* (1830), Mont. 69; *Ex parte Lloyd* (1822), Mont. 70 n.; *Taylor* v. *Clarke* (1862), 13 I. C. L. R. 574; *Baylis* v. *Grout* (1835), 2 My. & K. 316; Twelfth Annual Statement of the Bar Committee and First of the General Council of the Bar, p. 15. For an instance of a decision of the Bar Council on a question of retainer, see Annual Statement of the General Council of the Bar, 1904–5, p. 10.

(*s*) *Ex parte Lloyd, supra.*

(*t*) *Earl Cholmondeley* v. *Lord Clinton* (1815), 19 Ves. 261, *per* Lord ELDON, L.C., at p. 275. See p. 407, *post.*

(*u*) Tenth Annual Statement of the Bar Committee, p. 2; Yearly Practice, 1908, ii. 1497.

(*a*) *Re Harrisson*, [1908] 1 Ch. 282.

(*b*) Retainer Rules, r. 1, Yearly Practice, 1908, ii. 1497.

(*c*) *Ibid.*, r. 2.

(*d*) *Ibid.*, r. 3.

(*e*) *Ibid.*, r. 4.

(*f*) *Ibid.*, r. 5.

(*g*) *Ibid.*, r. 7, Yearly Practice, ii. 1489. If a counsel to whom a general retainer is given becomes a law officer of the Crown, the retainer is extinguished, and a fresh retainer is necessary on the law officer relinquishing office.

(*h*) *Ibid.*, r. 6.

a general retainer, counsel, after giving notice to the party from whom he has accepted the general retainer of the offer of the special retainer or brief, may accept the special retainer or brief, unless a special retainer or a brief be given within a reasonable time by the party from whom he has accepted the general retainer (*i*). Where a general retainer has been given, and a brief is not delivered to the retained counsel in any action or other proceeding in which the party giving the general retainer is concerned and to which it applies, or a special retainer or brief is not given within a reasonable time after a notice has been given by the counsel holding a general retainer that a special retainer or brief has been offered to him by another party, the general retainer is forfeited; but the holding of a general retainer does not entitle a King's Counsel to the delivery of a brief on occasions when it is usual to instruct a junior only (*k*). When a general retainer has been given for one person, and he is a party to a proceeding with others and appears separately, the retainer applies to that proceeding; but if he appears jointly with others, the retainer does not apply (*l*). A general retainer is not binding on counsel, unless it is accepted by him (*m*).

Fees on general retainers.

The fee for a general retainer is in Parliament (committees) ten guineas, in all other cases five guineas (*n*).

Special retainer.

678. A special retainer can only be given after the commencement of an action, appeal, or other proceeding (*o*). In an action or proceeding in the Supreme Court it gives the client a right to the services of counsel while the action or proceeding remains in or under the control of that court (*p*); in any other action or proceeding it gives the client a right to the services of counsel during the whole progress of such action or proceeding (*q*). Counsel who has been specially retained is entitled to the delivery of a brief on every occasion to which the special retainer applies, but if he is a King's Counsel, he is not entitled to the delivery of a brief on occasions when it is usual to instruct junior counsel only; where more than one junior counsel has been retained, only one of such junior counsel is entitled to the delivery of a brief on occasions when it is usual to instruct one junior counsel alone (*r*).

Circuit retainer.

A special retainer on circuit must be given for a particular assize (*s*), but if the place of trial is changed to another place on the same circuit, a fresh retainer is not required (*t*). A circuit retainer does not make it compulsory upon the counsel retained to go on the circuit, but only gives the client the right to the services of counsel if he attends the assize town and the case is entered for trial (*a*). If

(*i*) Retainer Rules, r. 8, Yearly Practice, 1908, ii. 1497.
(*k*) *Ibid.*, r. 9.
(*l*) *Ibid.*, r. 10.
(*m*) Annual Statement of the General Council of the Bar, 1901-2, p. 5 : Yearly Practice, 1908, ii. 1499.
(*n*) Retainer Rules, r. 23, Yearly Practice, 1908, ii. 1499.
(*o*) *Ibid.*, r. 11, Yearly Practice, 1908, ii. 1498.
(*p*) *Ibid.*, r. 12.
(*q*) *Ibid.*, r. 13.
(*r*) *Ibid.*, r. 14.
(*s*) *Ibid.*, r. 15.
(*t*) *Ibid.*, r. 16, Yearly Practice, 1908, ii. 1499.
(*a*) Annual Statement of the General Council of the Bar, 1898-9, p. 9.

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the action is not tried at the assize for which the retainer is given, the retainer must be renewed for every subsequent assize, until the action is disposed of, unless a brief has been delivered (*b*); the party giving the retainer has the right of renewing it for the next circuit, provided he does so in a reasonable time, *i.e.*, the currency of the pending circuit (*c*). A retainer may be given for a future assize without a retainer for an intervening assize, unless notice of trial is given for such intervening assize (*d*).

Appeals.

When counsel has held a brief for any party to an action or proceeding, but has not received a general or special retainer, he should not accept from any other party a general retainer or special retainer or brief on appeal, including an appeal to the House of Lords or to the Privy Council, without giving the original client the opportunity of retaining him or delivering a brief to him (*e*).

Opinion or pleadings gives right to brief.

679. Counsel who has drawn pleadings or advised or accepted a brief during the progress of an action on behalf of any party ought not to accept a retainer or brief from any other party without giving the party for whom he has drawn pleadings, or whom he has advised, or on whose behalf he has accepted a brief, the opportunity of delivering a brief to him. Such counsel is entitled to a brief at the trial or on any interlocutory application when counsel is engaged, unless express notice to the contrary is given to him with the instructions to draw such pleadings or advise, or at the time of the delivery of the brief (*f*), but he is not entitled to a brief in any case where he is unable or unwilling to accept it without receiving a special fee (*g*).

Duty to refuse or return brief.

Where a brief is offered or delivered to any counsel, and he finds that another counsel is entitled to a brief under these rules, the first-named counsel ought, where practicable, to ascertain from the solicitor offering or delivering such brief whether there is any sufficient explanation why a brief has not been offered or delivered to the other counsel, and, unless a satisfactory explanation is given, should refuse or return the brief (*h*).

What is sufficient explanation for non-delivery to counsel entitled.

The brief to which counsel is entitled at the trial under this rule is a regular brief such as counsel can accept, and not a complimentary brief or one marked with a fee such as counsel could not properly take (*i*). If the counsel so entitled is a junior and is offered a brief marked with a fee less than two-thirds or three-fifths of the leading brief and refuses it on the ground that it is so marked, these facts are not in themselves a satisfactory explanation of the non-delivery of the brief to him (*k*).

(*b*) Retainer Rules, r. 17, Yearly Practice, 1908, ii. 1499.
(*c*) Annual Statement of the General Council of the Bar, 1899-1900, p. 6.
(*d*) Retainer Rules, r. 18, Yearly Practice, 1908, ii. 1499.
(*e*) *Ibid.*, r. 19.
(*f*) *Ibid.*, r. 20. But this rule does not apply where the client expressly instructs the solicitor not to brief such counsel (*Re Harrisson*, [1908] 1 Ch. 282).
(*g*) Retainer Rules, r. 20, Yearly Practice, 1908, ii. 1499.
(*h*) Annual Statement of the General Council of the Bar, 1897–8, p. 8; Yearly Practice, 1908, ii. 1498.
(*i*) Twelfth Annual Statement of the Bar Committee and First of the General Council of the Bar, p. 14.
(*k*) Annual Statement of the General Council of the Bar, 1900–1, p. 5.

A change of solicitors is not of itself a sufficient or satisfactory explanation (*l*). If the client for whom counsel has drawn pleadings etc. is a company, the mere fact of its going into liquidation in the course of the action, whether followed by a change of solicitors or not, would not deprive counsel of his right to a brief at the trial (*m*). If the counsel to whom the brief is delivered receives what he considers is a satisfactory explanation why the brief has not been delivered to the counsel entitled, he may accept the brief, and is under no obligation to communicate with the other counsel (*n*). The rule does not apply to proceedings after the conclusion of the trial of an action, *e.g.*, to an appeal (*o*). The rule applies to administration actions and to county courts (*p*), but does not apply to criminal cases (*q*).

Duty towards former client.

680. Counsel cannot be required to accept a retainer or brief or to advise or draw pleadings in any case where he has previously advised another party on or in connection with the case, and he ought not to accept a retainer or brief or advise or draw pleadings in any case in which he would be embarrassed in the discharge of his duty by reason of confidence reposed in him by the other party, or in which his acceptance of a retainer or brief or instructions to draw pleadings or advise would be inconsistent with the obligation of any retainer held by him; and in any such case he should refuse to accept such retainer or brief or to advise or to draw pleadings, and should return such retainer or brief, if he has received it inadvertently (*r*). When counsel is aware that confidence has been reposed in him by someone who is not his client, but who has been assisting his client with information, counsel should not afterwards act against that person in any matter to which the information so given would be material, but there can be no duty towards a person who has not been the client of the counsel, unless the fact of confidence having been reposed is clearly made known to the counsel (*s*).

Subject to the exceptions above stated (*t*), a special retainer is binding if duly tendered, whether it is accepted or not (*a*).

Fees on special retainers.

The fees for special retainers are—in Parliament (committees) five guineas, in the House of Lords and Privy Council two guineas, in all other cases one guinea (*b*).

(*l*) Annual Statement of the General Council of the Bar, 1898–9, p. 9 ; Yearly Practice, 1908, ii., 1498.

(*m*) Annual Statement of the General Council of the Bar, 1900–1, p. 6.

(*n*) *Ibid.*, 1901–2, p. 7.

(*o*) *Ibid.*, 1898–9, p. 9 ; Yearly Practice, 1908, ii. 1498.

(*p*) Annual Statement of the General Council of the Bar, 1898–9, p. 9 ; 1896-7, p. 11.

(*q*) *Ibid.*, 1895–6, p. 7 ; 1902–3, p. 11.

(*r*) Retainer Rules, r. 21, Yearly Practice, 1908, ii. 1499. See *Earl Cholmondeley* v. *Lord Clinton* (1815), 19 Ves. 274.

(*s*) Annual Statement of the General Council of the Bar, 1896–7, p. 9.

(*t*) See the two preceding paragraphs ; Retainer Rules, rr. 19—21, Yearly Practice, 1908, ii. 1499.

(*a*) Annual Statement of the General Council of the Bar, 1901–2, p. 5 ; Yearly Practice, 1908, ii. 1499.

(*b*) Retainer Rules, r. 24, Yearly Practice, 1908, ii. 1499.

Counsel and Client.

Duty to accept briefs.

Special fees.

681. A barrister is bound to accept any brief in the courts in which he professes to practise, if a proper professional fee, according to the length and difficulty of the case, is offered and paid, and there are no special circumstances justifying him in refusing to accept a particular brief (*c*). Any counsel is at liberty to say that he will not practise in a particular court without a special fee of a named amount, or that he will not go into court at all without such special fee, but the special fee should be asked in all cases or courts except the one or more in which the counsel usually practises. A fee which is really a brief fee given for getting up a case in order to conduct it in court and for conducting it there, ought in no case to be divided and marked in part as a special fee, merely for the purpose of paying a less fee to other counsel engaged in the case (*d*).

King's Counsel in Chancery Division.

682. There is no rule of the bar that a King's Counsel who is not attached to a particular court of the Chancery Division cannot practise in that court without a special fee, but there is a well-recognised practice for King's Counsel practising in the Chancery Division who have attached themselves to a particular court not to accept a brief in any other court in that division (other than before the judge in the winding-up of companies) without a special fee. Where a King's Counsel attached to a particular court in the Chancery Division, having appeared at the trial of an action in that court, is asked to appear on the further consideration of the action in any court other than that to which he is attached, he should demand a special fee for so doing (*e*). A King's Counsel practising in the Chancery Division who changes his court should not appear in the court from which he has moved without a special fee, even in cases in which he has previously appeared as leader, and a special fee can be claimed for every brief which takes a leader into any court in which he does not usually practise (*f*).

Special fees on circuit.

683. No counsel can without a special fee appear on a circuit or at quarter sessions to which he does not belong. Counsel going on a circuit to which he does not belong must have a special fee, if a King's Counsel of one hundred guineas, and if a junior of fifty guineas, in addition to the brief fee (*g*). While it has been generally understood on all circuits that no one should take a special fee, properly so called, on his own circuit, there is no objection on principle to counsel having a special fee for going out of London

(*c*) Eighth Annual Statement of the Bar Committee, p. 3 ; Annual Statement, of the General Council of the Bar, 1902–3, p. 8 ; 1903–4, p. 15. See *O'Brien* v. *Cantwell* (1861), 12 I. Ch. R. 221 ; *Morris* v. *Hunt* (1819), 1 Chit. 544 ; and pp. 393, 407, *ante*. As to circumstances that make it undesirable that a barrister should in certain cases appear before particular tribunals or advise in particular cases, see Annual Statement of the General Council of the Bar, 1896–7, p. 10 ; 1897–8, p. 9 ; 1901–2, p. 6 ; 1905–6, p. 13.

(*d*) Annual Statement of the General Council of the Bar, 1902–3, pp. 6—8.

(*e*) *Ibid.*, 1898–9, p. 11. See 1903–4, p. 7.

(*f*) *Ibid.*, 1900–1, p. 11 ; 1903–4, p. 7.

(*g*) *Ibid.*, 1899-1900, p. 8.

to his own circuit or to a particular town on that circuit, provided that the special fee is taken in all such cases.

Quarter sessions.

684. As to special fees at quarter sessions the practice varies, but the General Council of the Bar have recommended that one uniform rule should be adopted by all sessions bars, and that the special fee for a barrister who is not a member of the sessions bar should be not less than ten guineas in addition to a proper brief fee. Where a special fee is marked in addition to the fee on the principal brief, no other special fee should be required for briefs in other cases connected with the same matter and entered at the same sessions (*h*).

SECT. 7.—*The Hearing of Counsel.*

SUB-SECT. 1.—*King's Bench Division.*

Opening pleadings.

685. At the trial of a civil action in the King's Bench Division (*i*) by a judge with a jury, the first step in the proceedings taken by counsel (*k*) is for the junior counsel for the plaintiff to open the pleadings, *i.e.*, state concisely the issues of fact on the record. No one but a stuff gownsman can open the pleadings, and if a King's Counsel appears for the plaintiff in any other than a pauper suit, a stuff gownsman must be instructed at least to open the pleadings (*a*).

Right to begin.

After the pleadings have been opened, a question may sometimes arise as to the onus of proof and the right to begin; if there is argument on this, only one counsel on each side is heard (*b*).

Opening case.

The next step is the opening by the leading counsel for the side that begins. The object of an opening is to give the jury a general notion of what will be given in evidence (*c*). Counsel in opening states the facts of the case, the substance of the evidence he has to adduce, and its effect on proving his case, and remarks upon any point of law involved in the case (*d*). Counsel may in opening refer to those facts of which the court takes judicial notice (*e*). Neither in the opening nor at any stage of the trial may counsel give his own personal opinion of the case (*f*), or mention facts which require proof, but which it is not intended to prove, or which are irrelevant

(*h*) Annual Statement of the General Council of the Bar, 1899-1900, p. 8.

(*i*) As to the practice in trials in the King's Bench Division generally, see title PRACTICE AND PROCEDURE.

(*k*) As to adjournment of the trial owing to the absence of counsel, see *Anon.* (1697), 2 Salk. 645; *Cockle* v. *Joyce* (1877), 47 L. J. (CH.) 543; *Stokes* v. *Kromshroder*, [1879] W. N. 196; *Anon.* (1885), 78 L. T. Jo. 286; *Sanders* v. *M'Connell* (1885), *Times* (12 February, 1885); *ibid.* (5 May, 1885); *Fass* v. *Gunter* (1886), *Times* (27 October, 1886).

(*a*) *James* v. *Harris* (1835), 7 C. & P. 257; *M'Askie* v. *M'Cay* (1868), 2 I. R. Eq. 447. See Annual Statement of the General Council of the Bar, 1902–3, p. 3.

(*b*) *Rawlins* v. *Desborough* (1837), 2 Moo. & R. 70; *Bastard* v. *Smith* (1837), 2 Moo. & R. 129. As to onus of proof, see title EVIDENCE.

(*c*) *Machell* v. *Ellis* (1845), 1 Car. & Kir., *per* POLLOCK, C.B., at p. 684.

(*d*) *Smart* v. *Rayner* (1834), 6 C. & P. 721; *Stevens* v. *Webb* (1835), 7 C. & P. 60; *R.* v. *Beard* (1837), 8 C. & P. 142; *Duncombe* v. *Daniell* (1837), 8 C. & P., *per* Lord DENMAN, C.J., at p. 227.

(*e*) *Darby* v. *Ouseley* (1856), 1 H. & N. 11; *Howard* v. *Gossett* (1842), Car. & M. 380. For the facts of which the court takes judicial notice, see title EVIDENCE.

(*f*) *Ryves* v. *A.-G.*, Annual Register, 1866 (Remarkable Trials), p. 255; Lord HERSCHELL, The Rights and Duties of an Advocate, p. 10.

SECT. 7. Hearing of Counsel.

to the issue to be tried (*g*). Neither the amount of general damages claimed by the plaintiff, nor the fact that money has been paid into court by the defendant, nor the amount paid in, may be communicated to the jury, even though the defendant's liability is admitted (*h*).

Examination of witnesses.

686. When the opening is finished, evidence is gone into, and the witnesses, if there are any, are orally examined, cross-examined and re-examined. If more counsel than one are engaged on the same side, they generally divide between them the examination of witnesses. It is the duty of the junior counsel on each side, when not engaged in examining witnesses, to take a note of the evidence; and such a note may be used on appeal to supplement the notes of the judge (*i*).

Refusal of witness to answer.

If a witness objects to answer a question or to produce a document, the witness cannot have counsel to argue for him (*k*); nor can counsel for one of the parties object in favour of a witness that an answer to a particular question may render him liable to a prosecution. Such an objection belongs to, and must be made by, the witness alone (*l*).

Argument on points of law.

687. If a point of law is raised at any stage, all the counsel on each side may be heard, but in practice it is not usual for more than two counsel on each side to argue (*m*). The leading counsel present for the side on which the point is raised has the right of reply. If in replying he cites new cases, one counsel on the opposite side is allowed to observe on those cases (*n*). On questions of fact only one counsel on each side is heard (*o*).

Close of case by party who begins and right of reply.

688. When all the witnesses for the party who begins have been called, his counsel intimates that his case is closed, and the counsel

(*g*) The statement of such matter in an opening cannot in strictness be objected to at that stage, the proper time to object being when the irrelevant matter is tendered in evidence (*Low* v. *Holmes* (1898), 8 I. Ch. R. 53). If irrelevant matter which may influence the minds of the jury is introduced, or if the speeches of counsel mislead the jury by the introduction of such matter, or of facts which are not proved, this may be a ground for ordering a new trial (*Praed* v. *Graham* (1889), 24 Q. B. D. 53, *per* Lord ESHER, M.R., at p. 55; *Wallace* v. *Cook* (1903), *Times* (15 June, 1903)).

(*h*) R. S. C., Ord. 22, r. 22; Annual Statement of the General Council of the Bar, 1898–9, p. 11; *Williams* v. *Goose*, [1897] 1 Q. B. 471; *Jacques* v. *South Essex Waterworks Co.* (1904), 20 T. L. R. 563. But see *Klamborowski* v. *Cooke* (1897), 14 T. L. R. 88.

(*i*) *Earl De la Warr* v. *Miles* (1881), 19 Ch. D. 80, *per* LUSH, L.J., at p. 83. Counsel briefed only to take a note ought not to take any part in the trial or hearing. See Annual Statement of the General Council of the Bar, 1903-4, p. 13; *Moscatti* v. *Lawson* (1835), 1 Moo. & R. 454.

(*k*) *R.* v. *Adey* (1831), 1 Moo. & R. 94; *Doe* d. *Rowcliffe* v. *Earl of Egremont* (1841), 2 Moo. & R. 386.

(*l*) *Thomas* v. *Newton* (1826), 1 Mood. & M. 48, n.; *Hebblethwaite* v. *Hebblethwaite* (1869), L. R. 2 P. & D. 29. It is not usual for counsel to take "stamp objections," *i.e.*, to object to the admissibility of a document in evidence on the ground that it is unstamped or insufficiently stamped, unless such defect goes to the validity of the document, or to take part in the discussion in support of such an objection, unless invited to do so by the court (Annual Statement of the General Council of the Bar, 1901-2, p. 5).

(*m*) Daniell's Chancery Practice, 7th ed. 596.

(*n*) *Fairlie* v. *Denton* (1828), 3 C. & P. 103.

(*o*) See *Conington* v. *Gilliat* (1876), 1 Ch. D. 694.

on the other side may then submit that there is no case to go to the jury. If the counsel on the other side does not announce his intention to adduce evidence, the counsel for the party who begins may address the jury a second time for the purpose of summing up his evidence (*p*), but he cannot do this if the judge holds that there is no case to go to the jury (*q*). Counsel for the party who does not begin will not be allowed to try to elicit from the jury an expression of opinion whether they desire him to call evidence (*r*), nor, after the counsel for the party who begins has summed up his evidence, will counsel for the other side be allowed to change his mind and adduce evidence (*s*). If counsel for the party who does not begin calls no evidence, he has the last word, except where the Sovereign is a party to the record, in which case either the Attorney-General or the Solicitor-General, by virtue of his office, can claim a right of reply (*t*). If counsel for the party who does not begin cites a case, but calls no witnesses, counsel for the party who begins has a right to observe on the case cited (*a*). If counsel for the party who does not begin opens facts to the jury and calls no witnesses, the judge may allow a reply to the counsel on the other side (*b*).

Conduct of opposite case.

689. When counsel for the party who does not begin announces his intention to call witnesses, then on the close of his opponent's case he opens his own case, and comments on the evidence that has been given (*c*), and states the effect of the evidence which he proposes to adduce. The witnesses are then examined, cross-examined, and re-examined, and he sums up his evidence (*d*).

Reply.

The counsel on the other side then replies generally on the whole case. If the counsel for the party who does not begin opens a defence on the facts and also relies upon a legal objection and, after citing cases in support of his objection, calls witnesses to establish the facts, he is entitled to a reply on the matter of law after the general reply of the counsel on the other side (*e*).

Representation of different litigants on same side.

690. Co-plaintiffs must appear by the same counsel, and cannot sever their case (*f*). Co-defendants may be represented by different counsel; and if they are so represented, it is in the discretion of the judge to decide how many counsel will be heard (*g*). Where the

(*p*) R. S. C., Ord. 36, r. 36.
(*q*) *Hodges* v. *Ancrum* (1855), 11 Exch. 214.
(*r*) *Moriarty* v. *Brooks* (1834), 6 C. & P. 684.
(*s*) *Ibid.*
(*t*) See *Rowe* v. *Brenton* (1828), 3 Man. & Ry. (K. B.) at p. 304.
(*a*) *Power* v. *Barham* (1835), 7 C. & P. 356, *per* COLERIDGE, J., at p. 358.
(*b*) *Crerar* v. *Sodo* (1827), 1 Mood. & M. 85. See *R.* v. *Bignold* (1823), 1 Dow. & Ry. (N. P.) 59; *Naish* v. *Brown* (1846), 2 Car. & Kir. 219; *Darby* v. *Ouseley* (1856), 1 H. & N. 1, 11. The calling of witnesses to prove some collateral issue does not give a right of reply (*Harvey* v. *Mitchell* (1841), 2 Moo. & R. 366).
(*c*) See *Glennie* v. *Glennie* (1863), 3 Sw. & Tr. at p. 110.
(*d*) See *Gilford* v. *Davis* (1860), 2 F. & F. 23.
(*e*) *Arden* v. *Tucker* (1832), 1 Moo. & R. at p. 192.
(*f*) *Ballard* v. *White* (1843), 2 Hare, 158; *Wedderburn* v. *Wedderburn* (1853), 17 Beav. 158; *Re Norwood's Patents* (1895), 12 R. P. C., *per* STIRLING, J., at pp. 219, 221; *Newton* v. *Ricketts* (1848), 2 Ph. 624; *Swift* v. *Grazebrook* (1842), 13 Sim. 185.
(*g*) *Nicholson* v. *Brooke* (1848), 2 Exch. 213.

SECT. 7. Hearing of Counsel.

interests of the defendants are the same, the court will not allow more than one cross-examination of the plaintiff's witnesses or more than one address to the jury (*h*). The defendants' witnesses will be examined by the different counsel in the same manner as if the defence were joint and not separate (*i*), but different counsel will be heard for each defendant on a legal objection (*k*).

Separate cross-examination and speeches.

Where several defendants appear by different counsel and have different interests, counsel for each defendant so appearing will be allowed to cross-examine the witnesses on the other side and to address the jury (*l*). It is in such a case in the discretion of the judge to say in what order the defendants are to cross-examine witnesses and address the jury. The order generally followed is that in which the defendants' names appear on the record (*m*).

If one defendant calls witnesses, and another, who is separately represented, does not, counsel for the defendant who does not call witnesses can only address the jury once, namely, in general before the witnesses for the other defendant are examined (*n*). If the evidence which it is proposed to give on behalf of one defendant is hostile to the interests of the other defendant, counsel for the defendant who does not call witnesses may be allowed to address the jury after the evidence has been heard for the other defendant (*o*). Where witnesses are subpœnaed by two defendants with different counsel, only one examination-in-chief of these witnesses will be allowed (*p*). Where defendants are separately represented, counsel for one co-defendant may cross-examine the witnesses called by a co-defendant (*q*). Where co-defendants are more opposed in interest to one another than to the plaintiff, permission may be given to each defendant or set of defendants to open and prove their cases separately as well as to cross-examine each other's witnesses (*r*).

Counsel for persons not parties.

691. Counsel for a person who is not a party to the record, but who has liberty to attend the trial, may not call witnesses or address the jury, but may cross-examine witnesses and suggest points of law (*a*).

(*h*) *Nicholson* v. *Brooke* (1848), 2 Exch. 213; *Sparkes* v. *Barrett* (1837), 8 C. & P. 442; *Chippendale* v. *Masson* (1815), 4 Camp. 174; *Doe* d. *Hogg* v. *Tindale* (1829), 3 C. & P. 565; *Mason* v. *Ditchbourne* (1835), 1 Moo. & R. 462; *Batty* v. *M'Cundie* (1828), 3 C. & P. 204, n.; *Palmer* v. *Maclear* (1858), 1 Sw. & Tr. 149; *Perring* v. *Tucker* (1829), 4 C. & P. 70.

(*i*) *Chippendale* v. *Masson*, *supra*.

(*k*) *Poole* v. *Sidden* (1832), Roscoe, Nisi Prius Evidence, 18th ed. 289.

(*l*) *Ridgway* v. *Phillips* (1834), 3 Dowl. 154; *King* v. *Williamson* (1822), 3 Stark. 162; *Massey* v. *Goyder* (1829), 4 C. & P. 162, n.; *Child* v. *Stenning* (1878), 7 Ch. D. 413.

(*m*) See *Phillips* v. *Willetts* (1840), 2 Moo. & R. 319; *Wynne* v. *Wynne* (1840), 2 Moo. & R. 321; *Child* v. *Stenning*, *supra*.

(*n*) See *Glennie* v. *Glennie* (1862), 3 Sw. & Tr. 109, at p. 110; but see *Ryland* v. *Jackson & Brodie* (1902), 18 T. L. R. 574.

(*o*) *Beale* v. *Mouls* (1843), 1 Car. & Kir. 1.

(*p*) *King* v. *Williamson* (1822), 3 Stark. 162.

(*q*) See *Allen* v. *Allen*, [1894] P. 248; *Lord* v. *Colvin* (1855), 3 Drew. 222.

(*r*) *Phillips* v. *Willetts*, *supra*; *Wynne* v. *Wynne*, *supra*.

(*a*) *Wright* v. *Wright* (1830), 7 Bing. 459, n. As to third party procedure, see R. S. C., Ord. 16, r. 52; *Coles* v. *Civil Service Supply Association* (1884), 26 Ch. D.

Summing up of judge.

692. After the plaintiff's reply the judge sums up the evidence to the jury and directs them on points of law. Counsel may correct misstatements of fact by the judge, but not errors of law (*b*). Counsel may ask the judge to put specific questions to the jury, but unless they are distinctly raised on the record, the refusal to put them does not amount to misdirection (*c*). Counsel on each side should take a note of the substance of the summing up and of the judgment for the purpose of informing the court above in the case of an appeal (*d*). Counsel should indorse on their briefs the effect of the verdict, judgment, or order of the court, and orders are often drawn up from such indorsements (*e*).

Divisional Court.

693. In the sittings of a Divisional Court of the King's Bench Division the number of counsel who are heard and the order in which they are heard vary with the nature of the proceedings.

In *ex parte* motions only one counsel is heard. Every counsel in court has a right to move, the Attorney-General being first called upon, then the Solicitor-General, then those "within the bar" according to their seniority, then the juniors; each counsel has a right to make one motion, till the bar is gone through, and then to move again (*f*). In appeals from inferior courts (*g*), or in an argument on a special verdict in a criminal case (*h*), or on a demurrer to an indictment, information, or inquisition, or in an argument on a special case, only one counsel on each side is heard (*i*). On showing cause against and on arguing in support of a rule *nisi*, and on opposed motions other than appeals from inferior courts, all the counsel on each side may be heard (*k*).

On the argument of any case where the court has granted an order *nisi* counsel for the party showing cause begins (*l*), on an argument on a special verdict or a verdict subject to a special case counsel for the prosecution (*m*), on the argument of a demurrer counsel for the party demurring (*n*).

529; *Barton* v. *London and North Western Rail. Co.* (1888), 38 Ch. D. 144; *Blore* v. *Ashby* (1889), 42 Ch. D. 682. And see title PRACTICE AND PROCEDURE. Counsel sometimes receives a "watching brief" on behalf of some person who is not a party to the record or allowed to take any part in the trial.

(*b*) *Payne* v. *Ibbotson* (1858), 27 L. J. (EX.) 341.

(*c*) *Walton* v. *Potter* (1841), 3 Man. & G. 411. See *Weiser* v. *Segar*, [1904] W. N. 93; *Seaton* v. *Burnand*, [1900] A. C., *per* Lord HALSBURY, L.C., at p. 143.

(*d*) *Ex parte Skerratt* (1884), 28 Sol. Jo. 376.

(*e*) See [1884] W. N. 91, *per* PEARSON, J.; R. S. C., Ord. 62, r. 4; *Yeatman* v. *Read* (1865), 13 L. T. 580; *Mayor of Bristol* v. *Cox* (1886), 30 Sol. Jo. 356.

(*f*) *Per* Lord MANSFIELD, C.J. (1756), 1 Burr. 57.

(*g*) *Hawes* v. *Peake* (1876), 24 W. R. 407.

(*h*) Short and Mellor's Crown Office Practice, 2nd ed. 121.

(*i*) *Spurling* v. *Bantoft*, [1891] 2 Q. B. at p. 390.

(*k*) See *R.* v. *Ricketts* (1837), 6 Ad. & El. 537; *R.* v. *Thorogood* (1840), 12 Ad. & El. 183.

(*l*) Crown Office Rules, 1906, r. 136.

(*m*) Short and Mellor's Crown Office Practice, 2nd ed. 121.

(*n*) *Ibid.* 198. As to the order in proceedings on *habeas corpus*, see Crown Office Rules, 1906, r. 226; *R.* v. *Baines* (1840), 12 Ad. & El. 213, n.; where a defendant is brought up for sentence on an indictment in the King's Bench Division, Crown Office Rules, 1906, r. 170; *R.* v. *Bunts* (1788), 2 Term Rep. 683; *R.* v. *Medley* (1834), 6 C. & P. at p. 300; where a defendant is brought up for sentence after

SECT. 7. Hearing of Counsel.

Court for Crown Cases Reserved.

694. In the Court for Consideration of Crown Cases Reserved only one counsel is heard on each side. The counsel for the prisoner begins; counsel for the Crown is then heard; counsel for the prisoner replies. The Attorney-General or Solicitor-General has no right of final reply in this court (*o*).

SUB-SECT. 2.—*Chancery Division.*

Chancery Division.

695. Under the old practice in Chancery the junior counsel on each side summed up the evidence (*p*). This course is still sometimes followed, but not invariably, and sometimes the leading counsel on each side opens and closes his case, and examines all the witnesses.

Motions.

696. As regards motions in the Chancery Divisions counsel are called upon in turn to move according to their seniority. Each counsel when called upon has the right to make two opposed motions before the next counsel is called upon (*q*). A motion for the discharge of a prisoner from custody is entitled to priority over all other motions (*a*).

SUB-SECT. 3.—*Probate, Divorce, and Admiralty Division.*

Probate etc. Division.

697. In the trial of an action in the Probate, Divorce, and Admiralty Division the order of proceedings is in most respects the same as in the King's Bench Division, but there are some variations arising out of the special procedure of the court (*b*). In Admiralty there are often several actions relating to the same matter, *e.g.*, the salvage of a ship, and these are frequently consolidated or tried together. In such a case, where different plaintiffs have different interests, separate counsel will be heard, and counsel for the plaintiffs will be allowed to cross-examine each other's witnesses as to matters in dispute between them (*c*).

judgment by default, Crown Office Rules 1906, rr. 171, 172; *R.* v. *Dignam* (1837), 7 Ad. & El. 593; *R.* v. *Sutton* (1828), 7 Ad. & El. 594, n.; as to motions to find security for the peace, Crown Office Rules, 1906, rr. 250, 251.

(*o*) *R.* v. *Frost* (1840), 9 C. & P. at p. 165. Compare *O'Connell* v. *R.* (1844), 11 Cl. & Fin. 155, at pp. 184, 185, 230; *Lord Dunglas* v. *Her Majesty's Officers of State for Scotland* (1842), 9 Cl. & Fin. at p. 199. The place of the Court for Crown Cases Reserved will be taken as regards any person convicted after April 18, 1908, by the Court of Criminal Appeal, constituted by the Criminal Appeal Act, 1907 (7 Edw. 7, c. 23), s. 1. See title CRIMINAL LAW AND PROCEDURE.

(*p*) *Kino* v. *Rudkin* (1877), 6 Ch. D., *per* FRY, J., at p. 163; *Bonnewell* v. *Jenkins*, [1877] W. N. 202. But see *Metzler* v. *Wood* (1877), 47 L. J. (CH.) 139. As to the practice in trials in the Chancery Division generally, see title PRACTICE AND PROCEDURE.

(*q*) Daniell's Chancery Practice, 7th ed. 1310.

(*a*) *Ashton* v. *Shorrock* (1880), 29 W. R. 117.

(*b*) See as to the cross-examination of a respondent on behalf of a co-respondent *Allen* v. *Allen*, [1894] P. 248; as to the separate representation of different interveners in a divorce suit *Dering* v. *Dering* (1868), L. R. 1 P. & D. at p. 534; of different defendants in a probate action *Pocock* v. *Lowe* (1868), L. R. 1 P. & D. 535, n.; as to proceedings under the Court of Probate Act, 1857 (20 & 21 Vict. c. 77), s. 26, *In the goods of Cope* (1867), 36 L. J. (P.) 83. See generally as to the practice in Probate actions title EXECUTORS AND ADMINISTRATORS, and in Divorce actions title HUSBAND AND WIFE.

(*c*) *The Scout* (1872), L. R. 3 A. & E. 512; *The Morocco* (1871), 1 Asp. M. L. C. 46; *The Willem III.* (1871), 1 Asp. M. L. C. 132. As to the practice in Admiralty

SUB-SECT. 4.—*Bankruptcy and Liquidation.* SECT. 7.

Hearing of Counsel.

698. In examinations under sect. 27 of the Bankruptcy Act, 1883 (*d*), the person summoned is allowed to have the assistance of counsel, if he is the debtor (*e*), or if the examination is the first step in litigation hostile to the witness (*f*). A witness summoned under this procedure is not entitled to recover from the party summoning him the cost of employing counsel to represent him, except where the witness summoned is a person with whom litigation is pending or intended (*g*). Bankruptcy.

699. A witness examined under sect. 115 of the Companies Act, 1862 (*h*), is entitled to be represented by counsel, who may examine the witness and take and carry away notes of the proceedings, but may only use the notes for the purpose of re-examining (*i*). Liquidation.

SUB-SECT. 5.—*Criminal Trials.*

700. In criminal trials the procedure is in many respects different from that which is followed in civil actions. Special rules govern the opening of counsel for the prosecution (*k*). Criminal trials.

Where no counsel appears for the prisoner, it is not necessary for counsel for the prosecution to make an opening speech to the jury, except when the circumstances are peculiar (*l*). When the prisoner is defended, counsel for the prosecution ought always to open the case (*m*); in the opinion of some judges, all cases should be opened, whether they are defended or not. In opening a case, counsel for the prosecution ought to state all that it is proposed to prove, as well declarations of the prisoner as facts, so that the jury may see if there be a discrepancy between the opening statements of counsel and the evidence afterwards adduced in support of them (*n*), unless such declarations should amount to a confession, when it would be improper for counsel to open them to the jury (*o*), as the circumstances in which the confession was made may make it inadmissible Prosecution.

actions generally, see title ADMIRALTY, Vol. I., pp. 80 *et seq.*; as to consolidation of actions, see pp. 92, 93, *ibid.*

(*d*) 46 & 47 Vict. c. 52.

(*e*) *Re Grey's Brewery Co.* (1883), 25 Ch. D., *per* CHITTY, J., at p. 405.

(*f*) *Ex parte Kemp, Re Russell* (1873), 42 L. J. (BCY.), *per* MELLISH, L.J., at p. 28; *Ex parte Waddell, Re Lutscher* (1877), 6 Ch. D. 328. See title BANKRUPTCY AND INSOLVENCY, p. 141, *ante.*

(*g*) *Ex parte Waddell, Re Lutscher, supra; Re Appleton, French & Scrafton, Ltd.*, [1905] 1 Ch. 749.

(*h*) 25 & 26 Vict. c. 89. See further on this point, title COMPANIES.

(*i*) *Re Breechloading Armoury Co.* (1867), L. R. 4 Eq. 453; *Re Cambrian Mining Co.* (1881), 20 Ch. D. 376. The examination is a private proceeding; and the registrar may exact, as a condition of a person being allowed to be present, an undertaking not to disclose to anyone, without the leave of the court, any information he may acquire at the examination (*Re London and Northern Bank*, [1902] 2 Ch. 73).

(*k*) As to the procedure in criminal cases generally, see title CRIMINAL LAW AND PROCEDURE.

(*l*) *R.* v. *Jackson* (1837), 7 C. & P. 773; *R.* v. *Bowler, ibid.*

(*m*) *R.* v. *Gascoine* (1837), 7 C. & P. 772.

(*n*) *R.* v. *Hartel* (1837), 7 C. & P. 773; *R.* v. *Davis* (1837), 7 C. & P. 785; *R.* v. *Orrell* (1835), 7 C. & P. 774.

(*o*) *R.* v. *Swatkins* (1831), 4 C. & P. 548; *R.* v. *Davis, supra.*

SECT. 7. **Hearing of Counsel.**

in evidence. The general effect only of any confession said to have been made by a prisoner ought to be mentioned to the jury (*p*). Counsel for the prosecution can only sum up the evidence for the prosecution, when the prisoner is defended by counsel (*q*).

Defence.

Where several prisoners are jointly indicted and tried together and are defended by different counsel, counsel for each prisoner may cross-examine the witnesses for the prosecution and address the jury in the order in which the different prisoners for whom they appear are named in the indictment (*r*). Counsel for one defendant may cross-examine witnesses called by another defendant, and the other defendant himself if he gives evidence (*s*). If the prisoner gives evidence himself and calls no other witnesses, he is examined immediately after the close of the evidence for the prosecution (*t*). If no witnesses other than the prisoner are called for the defence, the counsel for the prisoner has the last word, unless the Attorney-General or Solicitor-General is conducting the prosecution, in which case either of these officers has, by virtue of his office, a right of reply (*a*). When witnesses as to facts, other than the prisoner, are called for the defence, counsel for the prisoner may sum up the evidence, and in so doing may speak on the whole case (*b*).

Reply.

Counsel for the prosecution has a right of reply, but the right is seldom or never exercised where the witnesses called are only as to character (*c*).

SUB-SECT. 6.—*Court of Appeal.*

Court of Appeal.

701. On the argument of a case in the Court of Appeal two counsel are heard on each side (*d*), if the respondent is called upon,

(*p*) Archbold's Criminal Pleading, 23rd ed. 207.

(*q*) Criminal Procedure Act, 1865 (28 & 29 Vict. c. 18), s. 2. See *R.* v. *Rudland* (1865), 4 F. & F. 496 ; *R.* v. *Puddick* (1865), 4 F. & F. 497 ; *R.* v. *Holchester* (1866), 10 Cox, C. C. 226 ; *R.* v. *Webb* (1865), 4 F. & F. 862.

(*r*) *R.* v. *Barber* (1844), 1 Car. & Kir. 434, at p. 438 ; *R.* v. *Balfour* (1895), *Times* (29 October, 1895). As to the order of addresses to the jury when one prisoner calls witnesses, and another does not, see *R.* v. *Barber, supra,* at p. 439 ; *R.* v. *Burns* (1887), 16 Cox, C. C. 195.

(*s*) *R.* v. *Hadwen,* [1902] 1 K. B. 882.

(*t*) Criminal Evidence Act, 1898 (61 & 62 Vict. c. 36), s. 2 ; *R.* v. *Gardner,* [1899] 1 Q. B. 150.

(*a*) *R* v. *Marsden* (1829), Mood. & M. 439 ; *R.* v. *Christie* (1858), 1 F. & F. 75 ; *R.* v. *Toakley* (1866), 10 Cox, C. C. 406 ; *R.* v. *Barrow* (1866), 10 Cox, C. C. 407 ; *R.* v. *Radcliffe* (1746), 1 Wm. Bl. at p. 6 ; *R.* v. *O'Connell* (1843-4), 5 State Tr. (N. S.) at p. 31. The chief authorities are collected in 2 State Tr. (N. S.), Appendix E, 1019. As to statements by prisoners not on oath, see *R.* v. *Shimmin* (1882), 15 Cox, C. C. 122 ; *R.* v. *Attwood* (1884), 29 Sol. Jo. 29 ; *R.* v. *Millhouse* (1885), 15 Cox, C. C. 622 ; *R.* v. *Beard* (1837), 8 C. & P. 142.

(*b*) Criminal Procedure Act, 1865 (28 & 29 Vict. c. 18), s. 2 ; *R.* v. *Wainwright* (1875), 13 Cox, C. C. 171 ; *R.* v. *Dowse* (1865), 4 F. & F. 492 ; *R.* v. *Glass* (1865), 4 F. & F. 492.

(*c*) Memorandum on Practice, 7 C. & P. 676 ; *R.* v. *Stannard* (1837), 7 C. & P. 673 ; *R.* v. *Corfell* (1844), 1 Cox, C. C. 123. But see *R.* v. *Dowse, supra* ; *R.* v. *Glass, supra.* As to reply, when evidence is called by one of several prisoners only, see *R.* v. *Jordan* (1839), 9 C. & P. 118. Generally as to position of counsel for the prosecution in a criminal trial, see *R.* v. *Holchester* (1865), 10 Cox, C. C. 226 ; *R.* v. *Webb* (1865), 4 F. & F. 862 ; *R.* v. *Puddick* (1865), 4 F. & F. 497; *R.* v. *O'Connell* (1844), 5 State Tr. (N. S.), *per* CRAMPTON, J., at p. 703.

(*d*) *Sneesby* v. *Lancashire and Yorkshire Rail. Co.* (1875), 1 Q. B. D. 42. See *Hoare* v. *Bremridge* (1872), 21 W. R. 43 ; *Iles* v. *Assessment Committee of West Ham*

and one counsel for the appellant replies. If there are separate respondents to an appeal, and their interests are different, they may be heard by counsel separately in opposition to the appeal (*e*). SECT. 7. Hearing of Counsel.

SUB-SECT. 7.—*House of Lords.*

702. Only two counsel are heard on each side in the House of Lords, and one counsel in reply (*f*). Parties to an appeal, whether co-appellants or co-respondents, if they have distinct claims and interests on the same side, are allowed to appear by separate counsel, if express leave on petition has been first obtained (*g*). If there are separate respondents, but their case is the same, only one counsel will be heard for each respondent, or two for one on behalf of all (*h*). House of Lords.

SUB-SECT. 8.—*Privy Council.*

703. Two counsel are heard on each side, and no more (*i*). The procedure is similar to that in the House of Lords. Where there are several parties to an appeal, the practice is to hear by separate counsel those whose interests are different (*k*). Privy Council.

SUB-SECT. 9.—*County Courts etc.*

704. The trial of an action in the county court and the inferior civil courts is similar to a trial in the King's Bench Division of the High Court (*l*), but in such courts neither plaintiff nor defendant County courts.

Union (1882), 46 L. T., *per* Lord COLERIDGE, C.J., at p. 150. As to the practice in the Court of Appeal generally see titles COURTS; PRACTICE AND PROCEDURE.

(*e*) In one case, where the circumstances were special, counsel for one of several respondents was allowed to address the court in support of the appeal. (*Re Marquis of Ailesbury's Settled Estates*, [1892] 1 Ch. 506, *per* LINDLEY, L.J., at p. 526).

(*f*) The counsel heard in reply must be one of those that have been heard for the appellants, if two have been heard (*R.* v. *Millis* (1844), 10 Cl. & Fin. 534). But see *Julius* v. *Lord Bishop of Oxford* (1880), 5 App. Cas. at p. 221. As to the practice in the House of Lords generally, see titles PARLIAMENT; PRACTICE AND PROCEDURE.

(*g*) Macqueen, Practice of the House of Lords, 205; *Home* v. *Pringle* (1840), 8 Cl. & Fin. at p. 281; *Gore* v. *Stacpoole* (1812), Lords' Journals, xlviii. 822.

(*h*) *Prendergast* v. *Prendergast* (1850), 3 H. L. Cas. at pp. 217, 225. As to the order of hearing separate appellants, see *Thellusson* v. *Rendlesham* (1858), 7 H. L. Cas. 430, at p. 435, n. Appellants who bring separate writs of error on one indictment are held entitled to appear by separate counsel, and such counsel are entitled to separate openings and replies (*O'Connell* v. *R.* (1844), 11 Cl. & Fin. 155, at p. 183). As to the Attorney-General's right of reply in the House of Lords, see *ibid.* at pp. 184, 185, 230; *Lord Dunglas* v. *Her Majesty's Officers of State for Scotland* (1842), 9 Cl. & Fin. 199; *Drake* v. *A.-G.* (1843), 10 Cl. & Fin. 257, at p. 271.

(*i*) Macpherson, Practice of the Judicial Committee of the Privy Council, 125. As to the right of reply, see *Henfrey* v. *Henfrey* (1842), 4 Moo. P. C. C. 29, at p. 33. See further title COURTS.

(*k*) See *Re Downie* (1841), 3 Moo. P. C. C., *per* Lord BROUGHAM, at p. 419; *Re Woodcroft's Patent* (1840), 3 Moo. P. C. C. 172, n.; *Prinsep* v. *Dyce-Sombre* (1856), 10 Moo. P. C. C. at p. 234; *Jewa-Jee* v. *Trimbuk-Jee* (1842), 3 Moo. Ind. Ap. 138, at p. 152; *Maharajah Ishuree Persad Narain Sing* v. *Lal Chutterput Sing* (1842), 3 Moo. Ind. Ap. at p. 109; *Hocquard* v. *R.* (1857), 11 Moo. P. C. C. at p. 161; *East India Co.* v. *Robertson* (1858), 7 Moo. Ind. Ap. 361, at p. 363. See *Nawab Umjad Ally Khan* v. *Mussumat Mohumdee Begum* (1867), 11 Moo. Ind. Ap. 517, at p. 535.

(*l*) See as to the county court, County Courts Act, 1888 (51 & 52 Vict. c. 43), ss. 72, 164. See *ante*, p. 374, and title COUNTY COURTS.

SECT. 7. Hearing of Counsel.

has the right to sum up the evidence at the close of his case (*m*). Where the defendant in a county court calls evidence, the plaintiff has a right of reply (*n*).

SUB-SECT. 10.—*Proceedings before Justices.*

Petty sessions.

705. On the hearing before justices of informations or complaints which can be dealt with summarily, only one speech on either side is allowed as to the facts (*o*).

SECT. 8.—*Allowance of Fees on Taxation.*

Taxation of counsel's fees.

706. Counsel's fees which relate to litigation and have been paid by the solicitor may, if allowed on taxation between party and party, be recovered from the opposite side by the successful litigant to whom costs have been awarded (*p*). Fees paid by the solicitor on the losing side, and fees which are not allowed on party and party taxation, and fees relating to non-litigious matters may be recovered by the solicitor from the client, but are subject to taxation on the solicitor and client scale, on which many items are allowed that would be disallowed on party and party taxation. For the purposes of taxation, the *quantum* of fees to counsel, the number of counsel whose fees are allowed, and the occasions on which fees are allowed for instructing counsel are matters for the discretion of the taxing master, and the court will not interfere unless he proceeds on some wrong principle or does not exercise his discretion (*q*).

Advising.

707. A fee to counsel for advising whether an action will lie and who are the proper parties may be allowed on solicitor and client taxation (*r*).

Settling pleadings etc.

A fee to counsel for settling a writ of summons has been allowed on party and party taxation (*s*). Generally fees of one counsel for settling pleadings are allowed on party and party taxation (*a*). Fees of counsel for settling interrogatories and special affidavits are allowed on party and party taxation in proper cases, one fee

(*m*) *Dymock* v. *Watkins* (1883), 10 Q. B. D. 451.

(*n*) *Clack* v. *Clack*, [1906] 1 K. B. 483.

(*o*) Summary Jurisdiction Act, 1848 (11 & 12 Vict. c. 43), s. 14. See further title MAGISTRATES.

(*p*) *Morris* v. *Hunt* (1819), 1 Chit. 544. As to a successful litigant *in formâ pauperis*, see *Carson* v. *Pickersgill* (1885), 14 Q. B. D. 859; *Richardson* v. *Richardson*, [1895] P. 276; *Johnson* v. *Lindsay & Co.*, [1892] A. C. 110. As to costs generally see titles PRACTICE AND PROCEDURE; SOLICITORS.

(*q*) *A.-G.* v. *Lord Carrington* (1843), 6 Beav. 454; *Kidston* v. *Empire Marine Insurance Co.* (1867), 16 L. T. 286; *Hargreaves* v. *Scott* (1878), 4 C. P. D. 21; *Stanton* v. *Baring*, [1875] W. N. 188; *O'Brien* v. *Cantwell* (1861), 12 I. Ch. R. 221; *Brown* v. *Sewell* (1880), 16 Ch. D. 517; *City of Lucknow* (1885), 51 L. T. 907; *Aaron's Reefs, Ltd.* v. *Twiss*, [1894] 2 I. R. 242; *Wheeler* v. *Fradd* (1898), 14 T. L. R. 440; *Re Maddock*, [1899] 2 Ch. 588; *Hartopp* v. *Hartopp* (1904), 20 T. L. R. 216; *Peel* v. *London and North Western Rail. Co.*, [1907] 1 Ch. 607; R. S. C., Ord. 65, r. 27 (15).

(*r*) *M'Namara* v. *Malone* (1886), 18 L. R. Ir. 269.

(*s*) *Tisdall* v. *Richardson* (1887), 20 L. R. Ir. 199.

(*a*) *Davis* v. *Earl of Dysart* (1855), 25 L. J. (CH.) 122, affirmed on appeal, *ibid.*, 322.

being allowed for all the affidavits proper to be settled, which are or ought to be filed at the same time (*b*).

The costs of obtaining the advice of counsel on evidence and the proceedings in an action are generally allowed on party and party taxation (*c*). In an exceptional case the costs of a second opinion on evidence may be allowed (*d*). Advice on evidence.

Fees for conferences are allowed on party and party taxation, if it is made to appear to the taxing officer that for some special reasons such conferences were necessary or proper (*e*). Conferences.

As a rule the costs of one consultation between the leading and junior counsel are allowed on party and party taxation (*f*); in exceptional cases the costs of several consultations may be allowed (*g*). In election petitions, where the costs are taxed as between solicitor and client, several consultations are often necessary, and may be allowed (*h*). Consultations.

708. Costs of counsel at judge's chambers are allowed on party and party taxation, if the judge or master certifies that the case is fit for counsel, but, if no such certificate is given, will not be allowed even on solicitor and client taxation (*i*). In the King's Bench Division it is necessary to ask the judge or master to certify for counsel, but in the Chancery Division the certificate allowing the costs of attendance of counsel in chambers is a matter of course, unless a special order disallowing them is made (*k*). Counsel at judge's chambers.

709. It is not usual to allow on party and party taxation the costs of counsel attending on commission to take evidence abroad, or of counsel briefed to view the *locus in quo*, unless there are special circumstances (*l*). Commission to take evidence.

(*b*) R. S. C., Ord. 65, r. 27 (15); *Davies* v. *Marshall* (No. 2), (1861), 1 Drew. & Sm. 564; *Re Pender* (1847), 10 Beav. 390. As to drafts, if, in pursuance of any direction by the court or a judge, drafts are settled by any of the conveyancing counsel of the court, the expenses of procuring such drafts to be previously or subsequently settled by other counsel on behalf of the same parties on whose behalf such drafts were settled by the conveyancing counsel of the court will not be allowed on party and party or solicitor and client taxation, unless the court or a judge shall so determine (R. S. C., Ord. 65, r. 22). See *Re Jones* (1858), 27 L. J. (CH.) 706.

(*c*) R. S. C., Ord. 65, r. 27 (15).

(*d*) *Wicksteed* v. *Biggs* (1885), 52 L. T. 428.

(*e*) R. S. C., Ord. 65, r. 27 (45). See *Kidston* v. *Empire Marine Insurance Co.* (1867), 16 L. T. 286. A conference is a meeting between one counsel and a solicitor for the purpose of obtaining the oral advice of counsel; a consultation is a similar meeting at which two or more counsel are present.

(*f*) *Hill* v. *Peel* (1870), L. R. 5 C. P. 172, *per* BOVILL, C.J., at p. 182; *Re Anglo-Austrian Printing and Publishing Union*, [1894] 2 Ch. 622; *Weymann* v. *Corcoran* (1880), 41 L. T. 792.

(*g*) *Commissioner for Railways* v. *O'Rourke*, [1896] A. C. 594; *Leonhardt & Co.* v. *Kallé & Co.* (1895), 12 R. P. C. 306.

(*h*) *Hill* v. *Peel, supra*; *Tillett* v. *Stracey* (1870), L. R. 5 C. P. 185.

(*i*) R. S. C., Ord. 65, r. 27 (16), Ord. 56, r. 7; *Re Chapman* (1882), 10 Q. B. D. 54.

(*k*) *Re Gregory* (1890), 90 L. T. Jo. 56; *Webb* v. *Fitzgerald*, [1875] W. N. 244; *Greville* v. *Greville* (No. 2) (1859), 27 Beav. at p. 597.

(*l*) *Lecocq* v. *South Eastern Rail. Co.* (1866), 14 W. R. 649; *Leeds Forge Co.* v. *Deighton's Patent Flue and Tube Co.*, [1903] 1 Ch. 475.

SECT. 8. Allowance of Fees on Taxation.

Brief fees.

710. Brief fees are in the discretion of the taxing master both on party and party and solicitor and client taxation (*m*).

One counsel.

In some cases of interlocutory applications etc., the costs of only one counsel are allowed either on party and party or on solicitor and client taxation (*n*), but in proper cases the costs of two counsel may be allowed (*o*).

Generally the costs of only one counsel attending a reference are allowed on party and party taxation, but in exceptional cases the costs of two counsel are allowed (*p*).

Two counsel.

The costs of two counsel briefed for the trial of an action are generally allowed, but where the plaintiff, if successful, is only entitled to costs on the county court scale (*q*), the costs of only one counsel will be allowed him, unless the taxing officer should be of opinion that briefing more than one counsel was proper (*r*). In a proper case the costs of two counsel for each of the defendants who sever in their defence will be allowed (*s*).

Three counsel.

The rule is to allow the costs of two counsel (*t*) and not of three, except in special circumstances where three are necessary (*a*). Instructing a third counsel on the hearing of a case in the Court

(*m*) *Hill* v. *Peel* (1870), L. R. 5 C. P. 172; *Re Craven* (1889), 6 T. L. R. 105; *Wakefield* v. *Brown* (1874), L. R. 9 C. P. 410.

(*n*) *Hallows* v. *Fernie* (1867), 16 W. R. 175; *Cargill* v. *Bower* (1876), 4 Ch. D. 78, at p. 81; *Yearsley* v. *Yearsley* (1854), 19 Beav. 1; *Re Overend, Gurney & Co.* (1867), 17 L. T. 313; *Friend* v. *Solly* (1847), 10 Beav. 329.

(*o*) *Re Webb* (1873), 28 L. T. 726; *Sturge* v. *Dimsdale* (1846), 9 Beav. 170; *Cooke* v. *Turner* (1844), 12 Sim. 649; *Stephens* v. *Lord Newborough* (1848), 11 Beav. 403.

(*p*) *Hawkins* v. *Rigby* (1860), 29 L. J. (C. P.) 228; *Sinclair* v. *Great Eastern Rail. Co.* (1870), 21 L. T. 752; *Benton* v. *Ellis Lever & Co.* (1885), 1 T. L. R. 499; *Drew* v. *Josolyne* (1888), 4 T. L. R. 717; Annual Statement of the General Council of the Bar, 1895-6, 7.

(*q*) R. S. C., Ord. 65, r. 12.

(*r*) *Ibid.*, r. 27 (46).

(*s*) *Re Maddock*, [1899] 2 Ch. 588.

(*t*) *A.-G.* v. *Munro* (1849), 1 Mac. & G. 213; *Smith* v. *Earl of Effingham* (1847), 10 Beav. 378; *Smith* v. *Buller* (1875), L. R. 19 Eq. 473; *Midland Rail. Co.* v. *Brown* (1853), 10 Hare, App. xliv.; *Haslam* v. *O'Connor* (1872), 6 I. R. Eq. 615; *Mason* v. *Brentini* (1880), 42 L. T. 726; *Wegmann* v. *Corcoran* (1880), 41 L. T. 792; *Green* v. *Briggs* (1849), 7 Hare, 279; *Betts* v. *Cleaver* (1872), 7 Ch. App. 513; *France* v. *Carver*, [1875] W. N. 171; *Rayment* v. *Dimbleby*, [1877] W. N. 67; *Merchant Banking Co.* v. *Maud* (1875), L. R. 20 Eq. 452; *Flockton* v. *Peake* (1864), 4 New Rep. 456; *Leonhardt & Co.* v. *Kallé & Co.* (1895), 12 R. P. C. 306; *Glamorgan County Council* v. *Great Western Rail. Co.*, [1895] 1 Q. B. 21; 10 Ch. App., *per* JAMES, L.J., at p. 540; *Peel* v. *London and North-Western Rail. Co.*, [1907] 1 Ch. 607.

(*a*) *Morris* v. *Hunt* (1819), 1 Chit. 544; *General Steam Navigation Co.* v. *Mann* (1854), 2 W. R. 154; *Pearce* v. *Lindsay* (1860), 1 De G. F. & J. 573; *Stanton* v. *Baring*, [1875] W. N. 188; *Kirkwood* v. *Webster* (1878), 9 Ch. D. 239; *Lockstone* v. *London, Brighton and South Coast Rail. Co.* (1862), 12 C. B. (N. S.) 243; *Wentworth* v. *Lloyd* (1866), L. R. 2 Eq. 607; *Re Charles Laffitte & Co.* (1875), L. R. 20 Eq. 650; *North Eastern Rail. Co.* v. *Jackson* (1874), 22 W. R. 629; *Millard* v. *Burroughes*, [1880] W. N. 4; *Betts* v. *Clifford* (1860), 1 John. & H. 74; *Re Cathcart*, [1893] W. N. 107; *The Mammoth* (1884), 9 P. D. 126; *Bidder* v. *Bridges*, [1887] W. N. 208; *Dashwood* v. *Magniac*, [1892] W. N. 54; *Re Anglo-Austrian Printing and Publishing Union*, [1894] 2 Ch. 622; *Monnet* v. *Beck* (1897), 14 R. P. C. at p. 850; *Pneumatic Tyre Co.* v. *Ixion Patent Pneumatic Tyre Co.* (1897), 14 R. P. C. at p. 875; *Badische Anilin und Soda Fabrik* v. *La Société Chimique des Usines du Rhône and Wilson* (1897), 14 R. P. C. at p. 892.

of Appeal, the House of Lords, or the Privy Council, is an unusual expense, as only two counsel are heard there (*b*). The rule not to allow three counsel, unless there are special circumstances, applies to solicitor and client as well as to party and party taxation (*c*), and even if the client has sanctioned the employment of a third counsel, the costs of the third counsel will not be allowed on solicitor and client taxation, unless the solicitor has told the client that such costs will probably not be allowed on party and party taxation, and that the client will probably have to pay them out of his own pocket (*d*).

Brief fees of leader and junior.

711. Where the costs of two counsel are allowed, the brief fees of the leader and junior generally stand to one another in the proportion of three to two or five to three; the same proportion holds between the fees of a second and third counsel where three are instructed (*e*). Where the costs of two counsel are allowed, both may be juniors (*f*). The costs of a brief delivered to counsel have been allowed on party and party taxation, even where he did not actually attend at the trial (*g*).

Attending to hear judgment.

A fee for counsel attending to hear judgment in other sittings than those in which the action is tried is allowed on taxation, but not a fee to hear judgment in the same sittings (*h*).

Settling minutes.

A fee to counsel for settling minutes of a decision on further consideration has been allowed (*i*).

Retainer.

712. The costs of a retainer to counsel are not allowed on party and party taxation in the Supreme Court (*k*), but may be allowed on solicitor and client taxation (*l*).

Special fee.

A special fee for counsel going into a particular court or off his circuit (*m*) is not allowed on party and party taxation (*n*), or, unless the client assented, on solicitor and client taxation (*o*).

Refreshers.

713. Where any cause or matter is tried upon *vivâ voce* evidence in open court, and the trial extends over more than one day and

(*b*) *Re Broad and Broad* (1885), 15 Q. B. D. 252, affirmed on appeal, *ibid.* 420. For a case where the costs of three counsel in the House of Lords were allowed, see Daniell's Chancery Practice, 7th ed. 1093.

(*c*) *Downing College Case* (1838), 3 My. & Cr. 474; *Wastell* v. *Leslie* (1844), 14 Sim. 84.

(*d*) *Re Broad and Broad, supra.*

(*e*) Eighth Annual Statement of the Bar Committee, p. 2; Annual Statement of the General Council of the Bar, 1900-1, p. 5.

(*f*) R. S. C., Ord. 65, r. 27 (47).

(*g*) *Taylor* v. *Clarke* (1862), 13 I. C. L. R. 571; *Charman* v. *Brandon* (1900), 82 L. T. 369.

(*h*) *Re Biss*, [1903] 2 Ch. at p. 64.

(*i*) *Armit* v. *Paget* (1872), 6 I. L. T. 158.

(*k*) R. S. C., Ord. 65, r. 27 (44). Retainers are allowed on party and party taxation in the House of Lords (Webster, Parliamentary Costs, 4th ed. 331, 336).

(*l*) *Re Nordmann, Ex parte Hasluck* (1898), 67 L. J. (Q. B.) 996.

(*m*) As to special fees, see p. 408, *ante.*

(*n*) *The Warkworth* (1885), 1 T. L. R. 659; *Re Parson*, [1901] 2 Ch. 176; *Smith* v. *Earl of Effingham* (1847), 10 Beav. 378.

(*o*) *Brown* v. *Great Western Rail. Co.* (1887), 3 T. L. R. 582.

SECT. 8. Allowance of Fees on Taxation.

occupies either on the first day only or partly on the first and partly on a subsequent day or days more than five hours, the taxing officer may allow refresher fees to counsel for every clear day subsequent to that on which the five hours have expired (*p*). The like allowance may be made where the evidence-in-chief is not taken *vivâ voce*, if the trial is substantially prolonged beyond the period of five hours by the cross-examination of witnesses whose affidavits or depositions have been used. The taxing master has a discretion to allow or disallow refreshers (*q*).

Arbitration under Light Railways Act, 1896.

714. Where the compensation awarded at an arbitration under the Light Railways Act, 1896 (*r*), does not exceed £300, no charge for briefs to or attendance of counsel is allowed on taxation as against a light railway company; but such costs are allowed where the compensation exceeds £300 (*s*).

County court.

715. The allowance of counsel's fees in the county court is governed by certain scales which vary according to the amount recovered in the action. In some cases a certificate of the judge is required for the allowance of counsel's fees on taxation (*t*).

Clerk's fees.

716. Where fees are paid to counsel, it is usual to include therein certain fees, to which his clerk is entitled, and which can be recovered from counsel by the clerk in an action for money had and received (*a*).

(*p*) R. S. C., Ord. 65, r. 27 (48). See *Harrison* v. *Wearing* (1879), 11 Ch. D. 206; *Re Anglo-Austrian Printing and Publishing Union*, [1894] 2 Ch. 622; *O'Hara, Matthews & Co.* v. *Elliott & Co.*, [1893] 1 Q. B. 362; *The Courier*, [1891] P. 355; *Collins* v. *Worley* (1889), 60 L. T. 748. As to the calculation of a "clear day," see *Dunning* v. *Grosvenor Dairies*, [1901] W. N. 218; *Wicksteed* v. *Biggs* (1885), 52 L. T. 428; *Brown* v. *Sewell* (1880), 16 Ch. D. 517; *Boswell* v. *Coaks* (1887), 36 Ch. D. 444; *Walker* v. *Crystal Palace District Gas Co.*, [1891] 2 Q. B. 300. As to the proportion between the refresher fees of leader and junior, see Annual Statement of the General Council of the Bar, 1896-7, p. 11; 1903-4, p. 14.

(*q*) *Smith* v. *Wills* (1885), 53 L. T. 386; *Macleod* v. *Thrupp* (1892), 37 Sol. Jo. 31; *The Hestia*, [1895] W. N. 100. As to the amount of refreshers, by R. S. C., Ord. 65, r. 27 (48), as amended by R. S. C. (March), 1908, the taxing officer may allow from two to ten guineas a day. Under R. S. C. (January, 1902), Ord. 65, r. 27 (29), refreshers may be allowed exceeding ten guineas (*Cavendish* v. *Strutt*, [1904] 1 Ch. 524; *Stewart & Co.* v. *Weber* (1903), 89 L. T. 559). A special refresher to a particular counsel (*e.g.* fifty guineas a day) may be allowed on solicitor and client taxation, if the client has given the solicitor authority, express or implied, to instruct a particular counsel and to give such special fees, by way of refresher or otherwise, as may be necessary to secure his services (*Re Harrison* (1886), 33 Ch. D. 52). As to refreshers in actions where no witnesses are heard and in the Court of Appeal, in the Privy Council, and in the House of Lords, see *Easton* v. *London Joint Stock Bank* (1888), 38 Ch. D. 25, explaining *Svendsen* v. *Wallace* (1885), 16 Q. B. D. 27; *Edgington* v. *Fitzmaurice* (1885), 29 Sol. Jo. 650; as to the County Palatine Court of Lancaster, *Ebrard* v. *Gassier* (No. 2) (1886), 55 L. T. 741.

(*r*) 59 & 60 Vict. c. 48.

(*s*) Light Railways Act, 1896 (Costs), Rules, r. 1, [1898] W. N. 279. See title RAILWAYS AND CANALS.

(*t*) County Courts Act, 1888 (51 & 52 Vict. c. 43), ss. 118, 119; County Court Rules, 1903, Appendix IV., items 85—94, pp. 605, 606; Yearly County Court Practice, 1908, i. 359. See *Atkinson* v. *Mayor and Corporation of Carlisle*, [1896] 1 Q. B. 393; *Heap* v. *Peart*, [1891] 1 Q. B. 110. And see title COUNTY COURT.

(*a*) *Lyster* v. *Spearman* (1882), 72 L. T. Jo. 391.

SECT. 8. Allowance of Fees on Taxation.

The clerk, however, is not entitled to demand as of right any fee or remuneration whatever from his master's clients, but the fee is a mere gratuity (*b*), though it is allowed on taxation according to a fixed scale (*c*).

(*b*) *Ex parte Cotton* (1846), 9 Beav. 107.

(*c*) R. S. C., Ord. 65, r. 27 (51); First Annual Report of the Bar Committee, p. 1; Second Annual Report of the Bar Committee, p. 2.

The scale of clerks' fees is as follows:—

	£	s.	d.
Upon a fee under 5 guineas	0	2	6
5 guineas and under 10 guineas	0	5	0
10 „ „ 20 „	0	10	0
20 „ „ 30 „	0	15	0
30 „ „ 50 „	1	0	0
50 „ and upwards, per cent.	2	10	0
On consultations, senior's clerk	0	5	0
„ „ junior's clerk	0	2	6
On conferences	0	5	0
On retainers (where allowed)—			
General retainer	0	10	6
Common retainer	0	2	6

BASE FEE.

See REAL PROPERTY AND CHATTELS REAL.

BASTARDY.

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Part I.—Definition and Application of the Term.

SECT. 1.—*In General.*

Definition.

717. A bastard or illegitimate child is one born out of lawful wedlock (*a*). A child may be born out of lawful wedlock, either because he is the child of a woman who is not lawfully married at all (*b*), or because he is the child of a woman who is lawfully married, but upon whom he is begotten by another than her lawful husband (*c*).

SECT. 2.—*The Child of an Unmarried Woman.*

Child of unmarried woman.

718. The child of an unmarried woman is always a bastard (*d*), even though before the birth she has gone through the ceremony of marriage with the putative father, if the marriage be in fact invalid (*e*). The child, too, of a widow is a bastard if he be born so long after the husband's death that he cannot by any possibility be the issue of the husband (*f*).

(*a*) Co. Litt. 244 a.
(*b*) See note (*e*), *infra*.
(*c*) See pp. 427 *et seq.*, *post*.
(*d*) Co. Litt. 244 a. For the modes of legitimating such child, see pp. 435 *et seq.*, *post*.
(*e*) As, for example, a bigamous marriage (1 Rol. 357), or, until the passing of the Deceased Wife's Sister's Marriage Act, 1907 (7 Edw. 7, c. 47), a marriage with a deceased wife's sister (*Hill and Simmons* v. *Crook* (1873), L. R. 6 H. L. 265). For the effect of an invalid marriage, see *Shaw* v. *Gould* (1868), L. R. 3 H. L. 55; and for invalid marriages in general, see title HUSBAND AND WIFE.
(*f*) Co. Litt. 123 b; 1 Bl. Com., chap. 16, p. 456. The ordinary period of gestation is 270 to 275 days (*Bosvile* v. *A.-G.* (1887), 12 P. D. 177, *per* BUTT, J., at p. 183). See further Taylor, Medical Jurisprudence, 5th ed. (1905), Vol. II., p. 111; and title EVIDENCE.

SECT. 3.—*The Child of a Married Woman.*

SUB-SECT. 1.—*The Presumption of Legitimacy.*

SECT. 3. Child of Married Woman.

Child of married woman presumed legitimate.

719. Every child born of a married woman during the subsistence of the marriage (*g*) is *primâ facie* legitimate (*h*), and the presumption of legitimacy arises also where the child is born not more than nine months after the dissolution of the marriage by death (*i*) or otherwise (*k*). But in every case the husband and wife must have had opportunities of access (*l*) to each other during the period in which the child could be begotten and born in the course of nature (*m*), and they must not be proved to be impotent (*n*). The presumption, however, is not a presumption *juris et de jure*, which cannot be rebutted (*o*), but a presumption of fact only (*p*), which may be rebutted by evidence of circumstances inducing a contrary presumption (*q*), and such evidence must not be slight in its nature, but strong and satisfactory (*r*).

Where parties judicially separated.

720. Where, however, the parties are living apart under a decree for judicial separation (*s*), the presumption of legitimacy is reversed, and if a child be born more than nine months after the separation, it is presumed to be illegitimate until it be shown that husband and wife have come together again (*t*).

Where wife adulteress.

721. The presumption of legitimacy continues notwithstanding that the wife is shown to have committed adultery with any number of men (*a*). The law will not permit an inquiry whether the husband or some other man is more likely to be the father of the child (*b*),

(*g*) The marriage is deemed to be subsisting, even though it has been dissolved by a foreign court, if, according to English law, the foreign court had no jurisdiction to dissolve it (*Shaw* v. *Gould* (1868), L. R. 3 H. L. 55).

(*h*) Second answer of the judges in the *Banbury Peerage Case* (1811), 1 Sim. & St. 153, fully reported in Nicolas, Treatise on Adulterine Bastardy (1836), 182; *Head* v. *Head* (1823), 1 Sim. & St. 150.

(*i*) See note (*f*), p. 426, *ante*.

(*k*) A child born between the date of the decree *nisi* and the date of the decree absolute is *primâ facie* legitimate (*Evans* v. *Evans and Blyth*, [1904] P. 274). There appears to be no authority as to the status of a child born after the decree absolute, but the principles which determine the legitimacy of a child born after the husband's death would seem to apply. In the analogous case of judicial separation, the presumption does not apply if the child be born more than nine months after the separation (*Hetherington* v. *Hetherington* (1887), 12 P. D. 112).

(*l*) Where opportunities of access exist, it is immaterial whether or not the parties are living together (*R.* v. *Mansfield* (1841), 1 Q. B. 444).

(*m*) *Hargrave* v. *Hargrave* (1846), 9 Beav. 552.

(*n*) See first answer of the judges in the *Banbury Peerage Case, supra*; *Legge* v. *Edmonds* (1855), 25 L. J. (CH.) 125.

(*o*) *Bosvile* v. *A.-G.* (1887), 12 P. D. 177.

(*p*) *Gardner* v. *Gardner* (1877), 2 App. Cas. 723, *per* Lord CAIRNS, at p. 728.

(*q*) See first answer of the judges in the *Banbury Peerage Case, supra*.

(*r*) *Morris* v. *Davies* (1837), 5 Cl. & Fin. 163, *per* Lord LYNDHURST, at p. 215; *Plowes* v. *Bossey* (1862), 31 L. J. (CH.) 681; *Atchley* v. *Sprigg* (1864), 33 L. J. (CH.) 345.

(*s*) Or any equivalent (*Hetherington* v. *Hetherington*, *supra*). See title HUSBAND AND WIFE.

(*t*) *Hetherington* v. *Hetherington*, *supra*.

(*a*) *Gordon* v. *Gordon*, [1903] P. 141; *Cope* v. *Cope* (1833), 5 C. & P. 604; *R.* v. *Mansfield*, *supra*; *Wright* v. *Holdgate* (1850), 3 Car. & Kir. 158; even where the child was born fourteen months after the wife had eloped with her paramour (*Pryor* v. *Pryor and Shelford* (1887), 12 P. D. 165).

(*b*) *Morris* v. *Davies*, *supra*, *per* Lord COTTENHAM, at p. 243.

SECT. 3. Child of Married Woman.

and it must be affirmatively proved, before the child can be bastardised, that the husband did not have sexual intercourse with his wife at the time when it was conceived (*c*).

Where begotten before marriage.

722. The presumption of legitimacy exists even where, from the date of the child's birth, it is clear that it must have been begotten out of wedlock, as where it is born the day after the marriage (*d*). For the act of marriage is a recognition by the husband of the child as his own (*e*). The presumption, though it is not so strong as if the child were begotten after the marriage, is not met merely by proving that someone else had intercourse with the woman; and if sexual intercourse between the parties be not disproved, it is not open to the court to enter upon an inquiry as to who the father may be any more than if it were begotten during the marriage (*f*).

SUB-SECT. 2.—*How the Presumption of Legitimacy is rebutted.*

By proof of non-access of husband to wife.

723. The *primâ facie* presumption of legitimacy, which arises when husband and wife have opportunities of access, may be rebutted by satisfactory evidence that such access did not take place between them as by the law of nature is necessary in order for the man to be in fact the father of the child (*g*). The non-existence of this access (*h*) is a physical fact which may be proved by means of such legal evidence as is admissible in every other case in which it is necessary to prove a physical fact (*i*). But non-access is a fact to be proved by those denying the legitimacy (*k*).

Evidence necessary

In the absence of all evidence on one side or the other, sexual intercourse is presumed to have taken place (*l*), and the legitimacy of the child cannot be questioned (*m*). The presumption of sexual intercourse continues until it is encountered by such evidence as proves to the satisfaction of the court or jury that such sexual intercourse did not take place at any time when by such intercourse the husband could, according to the laws of nature, be the father of the child (*n*). The court or jury to whom the question is submitted must be satisfied that sexual intercourse did not take place, not

(*c*) *R.* v. *Luffe* (1807), 8 East, 193, *per* GROSE, J., at p. 208; *Gordon* v. *Gordon*, [1903] P. 141; *Heathcote's Divorce Bill* (1851), 1 Macq. 277; *R.* v. *Maidstone* (1810), 12 East, 550.

(*d*) Co. Litt. 244 a. See also *Anon.* v. *Anon.* (1856), 23 Beav. 273, *per* ROMILLY, M.R., at p. 273; *Gardner* v. *Gardner* (1877), 2 App. Cas. 723, where the child was born less than seven weeks after.

(*e*) *R.* v. *Luffe*, *supra*, *per* Lord ELLENBOROUGH, at p. 208.

(*f*) *Gardner* v. *Gardner*, *supra*, *per* Lord BLACKBURN, at p. 738.

(*g*) See second answer in the *Banbury Peerage Case* (1811), 1 Sim. & St. 153; *Morris* v. *Davies* (1837), 5 Cl. & Fin. 163, *per* Lord COTTENHAM, at p. 251.

(*h*) That is, of sexual intercourse. The non-existence of sexual intercourse is generally expressed by the words "non-access of the husband to the wife" (fifth answer in the *Banbury Peerage Case*, *supra*), or "non-generating access" (second answer in the same case).

(*i*) Second answer in the *Banbury Peerage Case*, *supra*; *Morris* v. *Davies*, *supra*, *per* Lord COTTENHAM, at p. 251; *The Poulett Peerage*, [1903] A. C. 395, *per* Lord HALSBURY, L.C., at p. 398.

(*k*) Second answer in the *Banbury Peerage Case*, *supra*; *R.* v. *Mansfield* (1841), 1 Q. B. 444, *per* Lord DENMAN, at p. 451; *R.* v. *Luffe*, *supra*, *per* GROSE, J., at p. 208.

(*l*) *Morris* v. *Davies*, *supra*, *per* Lord LYNDHURST, at p. 215.

(*m*) *Ibid.*, *per* Lord COTTENHAM, at p. 251.

(*n*) Fourth answer in the *Banbury Peerage Case*, *supra*.

upon a mere balance of probabilities, but upon evidence which must be such as to exclude all reasonable doubt in their minds (*o*).

Opportunity for sexual intercourse not conclusive.

724. In determining the question whether or not sexual intercourse at the proper time did take place, it is not sufficient to show that opportunities for sexual intercourse existed (*p*), for opportunities of sexual intercourse are not conclusive evidence that it took place (*p*); but the whole circumstances of the case must be considered (*q*). When husband and wife are shown to be sleeping together, there being no natural impediment, the evidence is irresistible that the intercourse took place (*r*). But the evidence is less strong when it is merely shown that they were living in the same town and had opportunities of meeting (*s*), or even that they were in the same house or room (*a*). In these circumstances a husband may in one sense be said to have access to his wife, and yet the facts may, instead of proving, tend to disprove that any sexual intercourse took place between them (*b*).

Evidence admissible.

725. Any direct evidence of access or non-access may be given (*c*), except that neither husband (*d*) nor wife (*e*) is permitted to give any

(*o*) *Morris* v. *Davies* (1837), 5 Cl. & Fin. 163, *per* Lord LYNDHURST, at p. 215; *Bosvile* v. *A.-G.* (1887), 12 P. D. 177; fifth answer in the *Banbury Peerage Case* (1811), 1 Sim. & St. 153; *Hargrave* v. *Hargrave* (1846), 9 Beav. 552.

(*p*) *Morris* v. *Davies*, *supra*, *per* Lord COTTENHAM, at p. 252; *R.* v. *Mansfield* (1841), 1 Q. B. 444.

(*q*) *Morris* v. *Davies*, *supra*, *per* Lord COTTENHAM, at p. 243.

(*r*) *Ibid.* Except where this factor exists, it is immaterial in determining the question of sexual intercourse whether the parties are living together or apart. See *Banbury Peerage Case*, *supra*, where the parties were living together, and yet the children were bastardised; *Morris* v. *Davies*, *supra*; *R.* v. *Mansfield*, *supra*; and *Legge* v. *Edmonds* (1855), 25 L. J. (CH.) 125.

(*s*) But where, though the parties may have met, the probabilities of the case are against the meeting, the burden of proof is on those who suggest that they did meet (*Aylesford Peerage Case* (1885), 11 App. Cas. 1, *per* Lord SELBORNE, at p. 15).

(*a*) Fifth answer in the *Banbury Peerage Case*, *supra*; *Morris* v. *Davies*, *supra*, *per* Lord COTTENHAM, at p. 243; though these facts would be sufficient in the absence of any proof raising a presumption to the contrary (*ibid.*).

(*b*) Fifth answer in the *Banbury Peerage Case*, *supra*; *Aylesford Peerage Case*, *supra*, *per* Lord BRAMWELL, at p. 18. See *Sibbet* v. *Ainsley* (1860), 24 J. P. 823.

(*c*) *Banbury Peerage Case*, *per* Lord REDESDALE, Nicolas, Treatise on Adulterine Bastardy (1836), 463.

(*d*) *R.* v. *Sourton* (1836), 5 A. & E. 180; *Guardians of Nottingham* v. *Tomkinson* (1879), 4 C. P. D. 343, where GROVE, J., at p. 348, says that a decision was hardly needed to show that such evidence was inadmissible at common law; *Re Walker* (1885), 53 L. T. 660; *Wright* v. *Holdgate* (1850), 3 Car. & Kir. 158; even though the marriage has been dissolved by reason of the wife's adultery (*Burnaby* v. *Baillie* (1889), 42 Ch. D. 282; *Pryor* v. *Pryor and Shelford* (1887), 12 P. D. 165), or though evidence has been given of an admission of paternity by him (*Ulverstone Union* v. *Park* (1889), 53 J. P. 629). The Evidence Further Amendment Act, 1869 (32 & 33 Vict. c. 68), s. 3, which renders the evidence of husband or wife admissible in "proceedings instituted in consequence of adultery," does not apply to legitimacy cases (*Guardians of Nottingham* v. *Tomkinson*, *supra*; *Re Walker*, *supra*; *Burnaby* v. *Baillie*, *supra*; *Re Rideout* (1870), L. R. 10 Eq. 41; *contra*, *Re Yearwood* (1877), 5 Ch. D. 545). But where the legitimacy of a child begotten before marriage is in question, the husband may himself give evidence of non-intercourse before marriage (*The Poulett Peerage*, [1903] A. C. 395, *per* Lord HALSBURY, at p. 398, disapproving *Anon.* v. *Anon.* (1856), 23 Beav. 273). So where the child is born more than nine months after a judicial separation (*Hetherington* v. *Hetherington* (1887), 12 P. D. 112).

(*e*) See cases in last note, and *Anon.* v. *Anon.*, *supra*; *Legge* v. *Edmonds*,

SECT. 3. Child of Married Woman.

evidence proving or tending to disprove (*f*) the fact of sexual intercourse between them (*g*). But, apart from this, all facts are admissible which show that it was a natural impossibility for the husband to be the father of the child (*h*). Such facts are the existence of some natural impediment arising from the husband being under the age of puberty (*i*) or labouring under disability occasioned by bodily infirmity (*k*), or the length of time that has elapsed since the death of the husband (*l*) or since his last meeting with his wife (*m*).

Circumstantial evidence.

726. But direct evidence of physical impossibility is not always available, and in that case circumstantial evidence of any kind is admissible to show that sexual intercourse between husband and wife is a moral impossibility (*n*).

Conduct of parties.

The most important evidence of this class is that of the conduct of husband and wife, which is always admissible (*o*); and statements made by them regarding the child may be given in evidence, not as evidence of legitimacy or illegitimacy, but as evidence of conduct (*p*). As regards the husband, it may be shown, on the one hand, that he had recognised the child as his own (*q*), or, on the other hand, that he had acted up to the day of his death as though no such child were in existence (*a*). In the case of the wife, it may

(1855), 25 L. J. (CH.) 125; *Atchley* v. *Sprigg* (1864), 33 L. J. (CH.) 345, *per* KINDERSLEY, V.-C., at p. 347; *Cope* v. *Cope* (1833), 5 C. & P. 604; *Goodright* d. *Stevens* v. *Moss* (1777), Cowp. 591; *R.* v. *Kea* (1809), 11 East, 132, where the husband was dead at the time the evidence was tendered. But if the child be otherwise proved illegitimate, the wife's evidence is admissible to show who is the father (*R.* v. *Luffe* (1807), 8 East, 193, as explained in *Yates* v. *Chippindale* (1862), 11 C. B. (N. S.) 512).

(*f*) If the party's evidence is otherwise relevant, and merely raises the question of access incidentally, there may be no objection (*R.* v. *Sourton* (1836), 5 A. & E. 180, *per* Lord DENMAN, at p. 185; but see *Yates* v. *Chippindale*, *supra*, per WILLES, J., at p. 518). Where such evidence has been wrongly admitted, a decision on the question of legitimacy is not therefore bad, provided that there was sufficient evidence of the fact to which no objection could be taken (*Yates* v. *Chippindale*, *supra*; *R.* v. *Luffe*, *supra*; *Ulverstone Union* v. *Park* (1889), 53 J. P. 629).

(*g*) Except on the question of non-access, the evidence of husband and wife is always admissible (*R.* v. *Sourton*, *supra*, *per* PATTERSON, J., at p. 189, and *R.* v. *Bramley* (1795), 6 Term Rep. 330, *per* Lord KENYON, at p. 331, where the mother's evidence was admitted to disprove the fact of marriage). See also *R.* v. *St. Peter's* (1735), 1 Burr. S. C. 25, where the supposed husband's evidence was admitted for the same purpose.

(*h*) *R.* v. *Luffe*, *supra*, *per* Lord ELLENBOROUGH, at p. 202. In his judgment in that case he discusses fully the question of natural impossibility.

(*i*) Co. Litt. 244 a.

(*k*) 1 Rol. 358; *R.* v. *Luffe*, *supra*, at p. 206. But the infirmity must preclude the possibility of sexual intercourse (*Plowes* v. *Bossey* (1862), 31 L. J. (CH.) 681).

(*l*) Co. Litt. 123 b. For the length of time requisite, see note (*f*), p. 426, *ante*.

(*m*) *R.* v. *Maidstone* (1810), 12 East, 550, where the husband had been abroad above two years before the birth. The inference of illegitimacy is not rebutted by the return of the husband to the wife a short time before the birth (*R.* v. *Luffe*, *supra*). See also *The Saye and Sele Barony* (1848), 1 H. L. Cas. 507.

(*n*) *Banbury Peerage Case*, *per* Lords ELLENBOROUGH, ERSKINE, and ELDON, Nicolas, Treatise on Adulterine Bastardy (1836), at p. 490 *et seq.*, 500 *et seq.*, and 523.

(*o*) *Morris* v. *Davies* (1837), 5 Cl. & Fin. 163; *The Aylesford Peerage* (1885), 11 App. Cas. 1.

(*p*) *The Aylesford Peerage*, *supra*.

(*q*) *Morris* v. *Davies*, *supra*, *per* Lord COTTENHAM, at p. 242.

(*a*) As in *Morris* v. *Davies*, *supra*. So a repudiation of the child is receivable to

be shown that she had a personal dislike of her husband; that she was carrying on an adulterous intercourse; that she did not inform her husband (*b*) of her pregnancy, though, if intercourse had taken place between them, there was no need for concealment (*c*); that the birth of the child and its existence had been studiously concealed from the husband (*d*); and, in general, any fact may be proved which shows that she regarded the child as the offspring of the adulterer (*e*).

Evidence of paramour.

The direct evidence of the wife's paramour is admissible, and he may be compelled to answer questions as to his adultery (*f*). Evidence of his conduct may also be given, such as, for example, that he assisted in concealing the child, educated it as his own, and provided for it in his will (*g*).

Part II.—Mode of determining the Question of Legitimacy.

SECT. 1.—*In General.*

Determination of legitimacy.

727. The question whether a person be legitimate or a bastard may be determined by Parliament, or by the courts. In the latter case the question may be raised as an issue in any proceedings in which it may be relevant (*h*), or proceedings may be taken for the express purpose of determining it (*i*).

SECT. 2.—*By Act of Parliament.*

By Act of Parliament.

728. The question of legitimacy may always be determined by Act of Parliament (*k*). The Act of Parliament may deal with a class of persons (*l*), or with a specified person, whom the Act declares to be legitimate (*m*) or a bastard (*n*). But it is not the practice of

disprove the legitimacy (*Morris* v. *Davies* (1837), 5 Cl. & Fin. 163, *per* Lord COTTENHAM, at p. 242), but it is not conclusive (*Gardner* v. *Gardner* (1877), 2 App. Cas. 723).

(*b*) Or the family doctor (*Burnaby* v. *Baillie* (1889), 42 Ch. D. 282).

(*c*) See *Gardner* v. *Gardner*, *supra*.

(*d*) These were the facts in *Morris* v. *Davies*, *supra*.

(*e*) *Bosvile* v. *A.-G.* (1887), 12 P. D. 177; *The Aylesford Peerage* (1885), 11 App. Cas. 1; *Goodright* d. *Tompson* v. *Saul* (1791), 4 Term Rep. 356, where the child had from birth taken the name of the adulterer; *Hawes* v. *Draeger* (1883), 23 Ch. D. 173; *Cope* v. *Cope* (1833), 5 C. & P. 604, where the child was registered at birth as illegitimate.

(*f*) *Evans* v. *Evans and Blyth*, [1904] P. 378.

(*g*) These were the facts in *Morris* v. *Davies*, *supra*. See also *The Aylesford Peerage*, *supra*.

(*h*) See pp. 432 *et seq.*, *post*.

(*i*) See pp. 433 *et seq.*, *post*.

(*k*) 4 Co. Inst. p. 36.

(*l*) See examples in note (*g*), p. 435, *post*.

(*m*) See stat. 35 Hen. 8, c. 1, and 1 Mar., sess. 2, c. 1, by which Queen Mary Tudor was declared legitimate. There appear to be no modern examples.

(*n*) See stat. 28 Hen. 8, c. 7, bastardising the King's two daughters; stat. 9 & 10 Will. 3, c. 11, "an Act for dissolving the marriage between Charles Earle of Maclesfeld and Anne his wife, and to illegitimate the children of the said Anne"; *The Townshend Peerage* (1843), 10 Cl. & Fin. 289, where, however, the

SECT. 2. By Act of Parliament.

Parliament to bastardise an individual unless he has had an opportunity of being heard (*o*).

SECT. 3.—*By Legal Proceedings.*

SUB-SECT. 1.—*In General.*

By legal proceedings.

729. Wherever, in any legal proceedings, the enforcement of a legal right (*p*), or the establishment of a claim to property (*q*), or to a dignity (*r*), depends upon the legitimacy of a particular person (*s*), the court, in determining the existence of the right or claim, will determine also the question of legitimacy (*t*). And this is so whether the person whose legitimacy is in question be alive (*a*) or dead (*b*), or whether he be a party to the proceedings or not (*c*).

Where, however, no such right or claim is involved, the court will not entertain the question of a person's legitimacy on the application of anyone but himself (*d*), and the only way in which proceedings can be taken to determine the question is by proceeding under the Legitimacy Declaration Act, 1858 (*e*).

SUB-SECT. 2.—*Where other Questions are involved.*

Where other questions are involved.

730. Where the question of legitimacy is involved with other questions, any court which has cognisance of these questions has cognisance of the question of legitimacy also. Thus in a claim to a peerage the House of Lords (*f*) may, in deciding upon the claim, have to decide that one or other of the claimants (*g*), or the ancestor through whom he claims (*h*), is a bastard. When legal rights are

Act as finally passed did not bastardise the children concerned, but simply declared them not to be the children of the Marquis Townshend.

(*o*) See *Hewat's Divorce Bill* (1887), 12 App. Cas. 312, where a paragraph bastardising a child born during the marriage was struck out for that reason; *The Townshend Peerage*, *supra*, at p. 318.

(*p*) *E.g.*, for compensation under Lord Campbell's Act (the Fatal Accidents Act), 1846 (9 & 10 Vict. c. 93) (*Dickinson* v. *North Eastern Rail. Co.* (1863), 2 H. & C. 735); or for damages for libel (*Poulett* v. *Chatto & Windus*, [1887] W. N. 192, 230).

(*q*) See *Goodright* d. *Tompson* v. *Saul* (1791), 4 Term Rep. 356; *Morris* v. *Davies* (1837), 5 Cl. & Fin. 163.

(*r*) See *The Poulett Peerage*, [1903] A. C. 395; *The Aylesford Peerage* (1885), 11 App. Cas. 1.

(*s*) If the right or claim cannot be brought to trial before the happening of some future event on which such right or claim depends, an action may be brought in the meantime to perpetuate testimony under R. S. C., Ord. 37, r. 35. But this course should not be taken when the real point in dispute can be at once determined by proceeding under the Legitimacy Declaration Act, 1858 (21 & 22 Vict. c. 93) (*West* v. *Lord Sackville*, [1903] 2 Ch. 378).

(*t*) See the cases cited in this and the following sub-sections.

(*a*) As in *Morris* v. *Davies*, *supra*.

(*b*) As in *Re Grove* (1888), 40 Ch. D. 216.

(*c*) As where affiliation proceedings are taken by a married woman, when the court must determine the child to be a bastard before they can make any order.

(*d*) *Yool* v. *Ewing*, [1904] 1 Ir. 434; *Re Chaplin's Petition* (1867), L. R. 1 P. & D. 328.

(*e*) 21 & 22 Vict. c. 93. See pp. 433 *et seq.*, *post*.

(*f*) By the Committee for Privileges. See titles PEERAGE AND OTHER DIGNITIES; COURTS.

(*g*) For modern examples, see *The Aylesford Peerage*, *supra*; *The Poulett Peerage*, *supra*.

(*h*) See *The Banbury Peerage* (1811), 1 Sim. & St. 153.

SECT. 3. By Legal Proceedings.

involved, whether personal (*i*) or proprietary (*k*), the King's Bench Division will have to determine the question. For instance, the plaintiff may bring ejectment (*k*), claiming to be entitled as heir-at-law to certain lands, and his legitimacy of descent may be the crucial question. Or he may claim compensation under the Fatal Accidents Act, 1846 (*l*), for the death of his father, and his right to compensation may turn on the same question (*m*). The Chancery Division, again, may be the proper tribunal, as where the question arises in connection with rights under a settlement (*n*), or claims to a fund in court (*o*), or in the administration of an estate (*p*). Where the question arises under a settlement, it may also, after a decree for dissolution of marriage, be raised on a petition to the Divorce Division for variation of settlements (*q*), when the court may direct an issue to be tried in order to ascertain the legitimacy of a child of the marriage (*a*). So, too, in affiliation proceedings, where the applicant is a married woman claiming in respect of a child born during the continuance of the marriage (*b*), the justices will have to determine whether the child is a bastard.

SUB-SECT. 3.—*Declaration of Legitimacy.*

Under the Legitimacy Declaration Act, 1858.

731. Any British subject (*c*) may apply by petition to the Divorce Division of the High Court for a decree declaring him (*d*) to be the

(*i*) See note (*l*), *infra*.

(*k*) As in *Goodright* d. *Tompson* v. *Saul* (1791), 4 Term Rep. 356.

(*l*) 9 & 10 Vict. c. 93, known as Lord Campbell's Act.

(*m*) *Dickinson* v. *North Eastern Rail. Co.* (1863), 2 H. & C. 735.

(*n*) See *Burnaby* v. *Baillie* (1889), 42 Ch. D. 282, and *Evans* v. *Evans and Blyth*, [1904] P. 274, *per* BARNES, J., at p. 283. And a settlement may be made for the express purpose of enabling the question to be raised, as in *Re Stoer* (1884), 9 P. D. 120.

(*o*) See *Re Stoer*, *supra*.

(*p*) See *Re Goodman* (1881), 17 Ch. D. 266.

(*q*) Under the Matrimonial Causes Act, 1859 (22 & 23 Vict. c. 61), s. 5. See title HUSBAND AND WIFE.

(*a*) As in *Evans* v. *Evans and Blyth*, *supra*. In *Pryor* v. *Pryor and Shelford* (1887), 12 P. D. 165, the court refused to order an inquiry, but the case does not suggest that the court could not do so (*Evans* v. *Evans and Blyth*, *supra*, *per* BARNES, J., at p. 280). But the court may instead direct the official solicitor to present on behalf of the child a petition under the Legitimacy Declaration Act, 1858 (21 & 22 Vict. c. 93) (*Douglas* v. *Douglas and Trevor* (1898), 78 L. T. 88). In each case the child in question was an infant.

(*b*) See pp. 443 *et seq.*, *post*.

(*c*) Or any person whose right to be deemed a British subject depends on his legitimacy (Legitimacy Declaration Act, 1858 (21 & 22 Vict. c. 93), s. 1).

(*d*) The Act enables a person to obtain a declaration of his own legitimacy only, not of the legitimacy of his parents or grandparents (*Dodds* v. *A.-G.* (1880), 42 L. T. 402), though he may obtain a declaration that the marriage of his parents or grandparents was valid (s. 1). The Act cannot be used to obtain declarations of another person's illegitimacy (*Re Chaplin's Petition* (1867), L. R. 1 P. & D. 328, *per* Lord PENZANCE, at p. 329; *Mansel* v. *A.-G.* (1877), 2 P. D. 265). To enable this to be done, there must be some right or claim involved (see p. 432, *ante*), and in a proper case (*e.g.*, where the legitimacy of some of the children of a lunatic's wife is in question) the court may direct a small settlement to be made on the children out of the lunatic's property, so as to enable the lunatic's legitimate children to raise the question of the right of the children whose legitimacy was disputed by a suit to perpetuate testimony (*Re Stoer*, *supra*).

SECT. 3. By Legal Proceedings.

legitimate child of his parents (*e*). But he must be domiciled in England or Ireland, or claim some real or personal estate in England (*f*). If he be an infant under seven years of age, he must proceed by a guardian appointed by the court (*g*), and the court will not, as a rule, appoint a guardian unless and until the registrar has reported whether the institution of proceedings is likely to benefit the infant (*h*).

Practice and procedure.

732. The practice and procedure are in general as in divorce (*i*), but the following points may be noted:—

The petition must be accompanied by an affidavit verifying the facts and denying collusion (*k*).

A copy of the petition and affidavit must be delivered to the Attorney-General at least one month before the presentation or filing of such petition, and on the hearing of the petition and any subsequent proceedings thereon the Attorney-General is to be the respondent (*l*).

Any persons may be cited by the petitioner, with the permission of the court (*m*), to attend the proceedings, and such persons (*n*) may become parties (*o*), with the permission of the court, and oppose the petition (*p*).

The court does not order trial by jury unless there is some issue for a jury raised on the pleadings (*q*).

Before setting the case down for trial the petitioner must represent to the registrar, by affidavit or otherwise, the exact state of the case, and if the registrar thinks there is some person who should be joined or cited to attend the proceedings, he will so direct (*r*).

Costs.

The court has a discretion as to costs, and may award them to any person cited, whether he opposes the petition or not (*s*). If he makes himself a party, he may be ordered to pay the petitioner's

(*e*) Legitimacy Declaration Act, 1858 (21 & 22 Vict. c. 93), s. 1.

(*f*) *Ibid.* The court has no power under the Act to declare a person to be the lawful heir of another (*Mansel* v. *A.-G.* (1877), 2 P. D. 265), or to be entitled to a dignity (*Frederick* v. *A.-G.* (1874), L. R. 3 P. & D. 196). But the petitioner may state in his petition the circumstances under which he is a claimant for real property (*Mansel* v. *A.-G.*, *supra*).

(*g*) *Re Upton* (1860), 6 Jur. (N. S.) 404. If he is over seven years of age, he may elect a guardian (*ibid.*).

(*h*) *Re Chaplin's Petition* (1867), L. R. 1 P. & D. 328.

(*i*) Legitimacy Declaration Act, 1858 (21 & 22 Vict. c. 93), s. 4. See title HUSBAND AND WIFE.

(*k*) *Ibid.*, s. 3.

(*l*) *Ibid.*, s. 6.

(*m*) But the court does not itself decide who are to be cited. The petitioner must himself name them, and show why they should be cited (*Re Shedden* (1859), 5 Jur. (N. S.) 151; *Upton* v. *A.-G.* (1863), 32 L. J. (P.) 177). But see *Brinkley* v. *A.-G.* (1889), 14 P. D. 83.

(*n*) Persons not cited will not be permitted to intervene, unless they have some real interest in the petition (*Upton* v. *A.-G.*, *supra*).

(*o*) A person cited does not become a party until he applies for permission to do so (*Bain* v. *A.-G.*, [1892] P. 261, *per* KAY, L.J., at p. 267).

(*p*) Legitimacy Declaration Act, 1858 (21 & 22 Vict. c. 93), s. 7.

(*q*) *Ryves* v. *A.-G.* (1865), L. R. 1 P. & M. 23.

(*r*) *Brinkley* v. *A.-G.*, *supra*.

(*s*) Legitimacy Declaration Act, 1858 (21 & 22 Vict. c. 93), s. 5.

costs (*a*). But no costs can be awarded to or against the Attorney-General (*b*).

SECT. 3. By Legal Proceedings.

SUB-SECT. 4.—*Effect of Legal Proceedings.*

Effect of legal proceedings.

733. A decree under the Legitimacy Declaration Act, 1858, declaring the legitimacy or illegitimacy of the petitioner is binding to all intents and purposes on the Crown and all persons whomsoever (*c*), except that it is not, in any case, to prejudice any person, unless he has been cited or made a party to the proceedings, or claims through some person so cited or made a party, or unless the decree is subsequently proved to have been obtained by fraud or collusion (*d*).

In other cases the decision of the court will, it is apprehended, be subject to the ordinary rules (*e*), and consequently will only be binding on the parties to the decision and those claiming through them (*f*).

Part III.—Legitimation of Bastards.

SECT. 1.—*In General.*

Legitimation by Act of Parliament.

734. Where a person is admittedly a bastard by birth, there is no way, speaking generally, in which he can be made legitimate, except by an Act of Parliament (*g*). For the law of England has always refused (*h*) to accept the doctrine (*i*) that a bastard child may be

(*a*) *Bain* v. *A.-G.*, [1892] P. 261.

(*b*) *Bain* v. *A.-G.*, [1892] P. 217, *per* BUTT, P., at p. 221. There was no appeal on this point.

(*c*) Legitimacy Declaration Act, 1858 (21 & 22 Vict. c. 93), s. 1.

(*d*) *Ibid.*, s. 8.

(*e*) For these see title JUDGMENTS AND ORDERS.

(*f*) See *Anderson* v. *Collinson*, [1901] 2 K. B. 107, *per* Lord ALVERSTONE, C.J., at p. 109, and *Watson* v. *Little* (1860), 5 H. & N. 472, where the point was not decided. Both cases turn on the conclusiveness of affiliation proceedings, and the point does not appear to have been raised elsewhere.

(*g*) 4 Co. Inst. 36. This was done in the case of John of Gaunt's bastard children by a statute of Richard II. (1 Bl. Com., chap. 16, p. 459). There are no clear modern examples, but see the Colonial Marriages (Deceased Wife's Sister) Act, 1906 (6 Edw. 7, c. 30); the Deceased Wife's Sister's Marriage Act, 1907 (7 Edw. 7, c. 47); the Marriage Act, 1835 (5 & 6 Will. 4, c. 54). The effect of the legitimation will depend upon the terms of the Act of Parliament. Thus the Colonial Marriages (Deceased Wife's Sister) Act, 1906, legitimates for all purposes, expressly including the right of succession to real property, and to honours and dignities within the United Kingdom; whereas in the case of John of Gaunt's children the legitimation was declared not to give them the right to succeed to the Crown. Similarly the Deceased Wife's Sister's Marriage Act, 1907, by s. 2 renders the legitimation subject to all rights and interests existing on August 28, 1907, and consequently it might be argued that a power of appointment amongst children with a gift over in default of appointment would not become exercisable in favour of the children of a marriage made valid by the Act, as the rights of those taking in default would thus be prejudicially affected; but the effect of the section has not yet been judicially determined. See further, title POWERS.

(*h*) Statute of Merton, 1236 (20 Hen. 3, c. 9), which was said by Lord BROUGHAM in *Fenton* v. *Livingstone* (1859), 3 Macq. 497, at p. 532, to be declaratory of the common law. See *Birtwhistle* v. *Vardill* (1839), 7 Cl. & Fin. 895, for a full discussion of the subject by TINDAL, C.J., at pp. 929 *et seq.*

(*i*) Which is followed in the Roman law (Just. Inst. i. 10, 13), and those systems of law derived therefrom. For instances, see p. 436, *post.*

SECT. 1. In General.

legitimated by the subsequent marriage of his parents. Nevertheless a legitimation by such marriage is to some extent recognised by the courts.

SECT. 2.—*Legitimation by Subsequent Marriage.*

SUB-SECT. 1.—*Requisites for Legitimation.*

Domicile.

735. In order to enable a child who is a bastard at birth to be made legitimate by the subsequent marriage of his parents it is necessary that the child should possess at birth the capacity of being so made legitimate (*k*). This capacity is derived from the father (*l*), and its existence depends upon the domicile of the father at the time of the birth (*m*). The nationality of the father, if different from his domicile, has no bearing on the question (*n*). Further, the domicile (*o*) or nationality (*p*) of the mother, if either differs from that of the father, or the place of the child's birth (*q*), is immaterial.

Domicile of father at birth of child and also at date of marriage.

At the time of the child's birth the father must be domiciled in a country allowing legitimation by subsequent marriage, so as to give to the child the capacity of being made legitimate by such a marriage (*r*). But it is the subsequent marriage which gives the legitimacy (*s*), and therefore, at the time of the marriage also (*t*), the father must be domiciled in a country, though not necessarily the same (*a*), which attributes to the marriage that effect, though the actual place of the marriage, equally with that of the birth, is immaterial (*b*). Consequently, if the father's domicile at the time of the birth be English, no subsequent change of domicile can operate to legitimate his child in England (*c*). Nor will marriage in a

(*k*) *Re Grove* (1888), 40 Ch. D. 216.

(*l*) *Re Grove, supra, per* COTTON, L.J., at p. 232; *Re Andros* (1883), 24 Ch. D. 637.

(*m*) *Re Grove, supra, per* COTTON, L.J., at p. 232. For the meaning and application of the term domicile, see title CONFLICT OF LAWS.

(*n*) Compare *Re Grove, supra*, where the bastard child of a Swiss domiciled in England was held not to be legitimated by the subsequent marriage of her parents, with *Re Goodman* (1881), 17 Ch. D. 266, where the legitimation took effect by reason of the law of the father's domicile, though he was English by nationality. The father in the last case cited had four illegitimate children before his marriage, three of whom were born whilst he was domiciled in England, and these three were held (*Goodman* v. *Goodman* (1862), 3 Giff. 643) to be illegitimate in spite of the subsequent marriage of their parents.

(*o*) *Re Grove, supra, per* STIRLING, J., at p. 224; *Udny* v. *Udny* (1869), L. R. 1 Sc. & Div. 441, *per* Lord HATHERLEY, L.C., at p. 448.

(*p*) As in *Munro* v. *Munro* (1840), 7 Cl. & Fin. 842, where the mother was English.

(*q*) *Munro* v. *Munro, supra*, where the child was born in England; *Udny* v. *Udny, supra, per* Lord CHELMSFORD, at p. 456.

(*r*) *Per* COTTON, L.J., in *Re Grove, supra*, at p. 232; *Udny* v. *Udny, supra.*

(*s*) *Ibid.*

(*t*) *Munro* v. *Munro, supra; Re Grove, supra.*

(*a*) This seems to follow on principle. See the words of COTTON, L.J., in *Re Grove, supra*, at p. 233.

(*b*) *Munro* v. *Munro, supra*, where both the marriage and the birth took place in England.

(*c*) *Udny* v. *Udny, supra, per* Lord HATHERLEY, at pp. 447, 448.

country allowing legitimation (*d*), even though the child is born there and the mother is a native (*e*).

SECT. 2. Legitimation by Subsequent Marriage.

SUB-SECT. 2.—*The Effect of Legitimation.*

Effect of legitimation.

736. Where a child is once legitimated by the subsequent marriage of his father and mother, no change in domicile on the part of his father afterwards can affect his legitimacy (*f*). He is then for all purposes and to all intents legitimate (*g*), except that, if he is the child of an alien mother born abroad, his legitimation does not render him a natural-born subject (*h*), and except in regard to his succession to property, where his legitimacy is subject to qualification (*i*).

Succession to property.

Personalty.

737. Where the property, his succession to which is in question, is personal, his legitimacy is absolute (*k*); and he stands on the same footing as a child who is legitimate by reason of his birth after the marriage (*l*). He is then entitled to take under a bequest to children (*m*), or on the intestacy of any person to whom by his legitimation he becomes relative to succeed or share as next of kin of the intestate (*n*), and whenever the succession is to his father, he pays duty as a child, and not as a stranger in blood to the deceased (*o*).

Realty.

738. But where the succession to realty is in question, his legitimacy is subject to a qualification, namely, that it does not necessarily include heirship to English land (*p*). This qualification, however, only operates in the case of intestacy (*q*), and prevents a child so legitimated from succeeding to lands in England as heir-at-law by descent (*r*) or from transmitting heritable blood to his own legitimate children so as to enable them to claim through him (*s*). He is entitled to share equally with his brothers born after the marriage in a devise of realty to "children" (*t*); and in that case, as also where the devise is to him by name, he will pay duty as a child (*u*) where the property is left to him by his father.

(*d*) *Rose* v. *Ross* (1830), 4 Wils. & S. 289.
(*e*) *Re Wright* (1856), 25 L. J. (CH.) 621.
(*f*) *Re Goodman* (1881), 17 Ch. D. 266, *per* JAMES, L.J., at p. 298.
(*g*) *Birtwhistle* v. *Vardill* (1839), 7 Cl. & Fin. 895, as explained by JAMES, L.J., in *Re Goodman*, *supra*, at p. 298. There is no English decision as to the date from which the legitimation operates. In Scotland it operates from the time of the marriage only, not from the time of the birth (*Shedden* v. *Patrick* (1854), 1 Macq. 535).
(*h*) Within the meaning of the British Nationality Act, 1730 (4 Geo. 2, c. 21) (*Shedden* v. *Patrick*, *supra*). And see further, title CONSTITUTIONAL LAW.
(*i*) *Fenton* v. *Livingstone* (1859), 3 Macq. 497, *per* Lord WENSLEYDALE, at p. 547.
(*k*) *Ibid.*; *Re Andros* (1883), 24 Ch. D. 637, *per* KAY, J., at p. 638.
(*l*) *Re Andros*, *supra*; *Re Grey*, [1892] 3 Ch. 88.
(*m*) *Re Andros*, *supra*.
(*n*) *Re Goodman*, *supra*.
(*o*) *Wallace* v. *A.-G.* (1865), 1 Ch. App. 1, *per* Lord CRANWORTH, at p. 8; *Skottowe* v. *Young* (1871), L. R. 11 Eq. 474.
(*p*) *Birtwhistle* v. *Vardill*, *supra*, as explained by JAMES, L.J., in *Re Goodman*, *supra*, at p. 298.
(*q*) *Re Grey*, *supra*.
(*r*) *Birtwhistle* v. *Vardill*, *supra*. For the exception to this rule in the case of the *bastard eigne*, see p. 439, *post*. Nor can his father succeed to him (*Re Don* (1858), 27 L. J. (CH.) 98).
(*s*) *Birtwhistle* v. *Vardill*, *supra*, *per* TINDAL, C.J., at p. 937.
(*t*) *Re Grey*, *supra*.
(*u*) *Wallace* v. *A.-G.*, *supra*, *per* Lord CRANWORTH, at p. 8; *Skottowe* v. *Young*, *supra*.

Part IV.—The Legal Position of a Bastard.

SECT. 1.

In General.

SECT. 1.—*In General.*

In what respects position peculiar.

739. There is no distinction between a bastard and another person except in respect of the recognition of relationship and the rights and obligations connected therewith (*x*).

SECT. 2.—*A Bastard's Relationships.*

Bastard's relationships.

740. The rule that a bastard is *nullius filius* (*a*) applies only to the case of inheritance (*b*) and cases analogous thereto (*c*). The law takes notice for several purposes of the natural relationship between him and his parents (*d*); but as regards other relatives (*e*) the recognition is very slight. A natural relationship is sufficient to bring parties within the prohibited degrees of marriage (*f*). In allowing maintenance for an infant the court may take into consideration, in fixing the amount, the fact that he has an illegitimate brother born of the same parents (*g*).

SECT. 3.—*A Bastard's Rights and Liabilities.*

SUB-SECT. 1.—*Personal.*

Name.

741. A bastard has no surname by inheritance, but he may acquire one by reputation (*h*). When his birth is registered, no entry is to be made of the name of any person as his father except at the joint request of his mother and the person acknowledging himself to be the father, in which case the latter must sign the register along with the mother (*i*).

Domicile and settlement.

742. From his mother he acquires a domicile (*k*), and he follows her settlement till he attains the age of sixteen or acquires a settlement of his own (*l*). From his father he may acquire a capacity to be legitimated by the subsequent marriage of his parents (*m*).

Compensation for death.

743. He cannot be compelled to support his parents (*n*). On the other hand, he has a right to receive compensation for the death of either parent or grandparent in cases falling under the Workmen's Compensation Act, 1906 (*o*), but not under the Fatal Accidents Act, 1846 (*p*); and the rights of his parents or

(*x*) See 1 Bl. Com., chap. 16. Compare *Clarke* v. *Carfin Coal Co.*, [1891] A. C. 412, *per* Lord SELBORNE, at p. 427.
(*a*) Co. Litt. 3 b.
(*b*) *R.* v. *Hodnett* (1786), 1 Term Rep. 96, *per* BULLER, J., at p. 101.
(*c*) See notes (*p*) and (*q*), *infra*.
(*d*) See pp. 440 *et seq.*, *post*.
(*e*) As regards his wife or legitimate descendants, he is in the same position as any other husband or father (Co. Litt. 3 b).
(*f*) *R.* v. *Brighton* (1861), 1 B. & S. 447.
(*g*) *Bradshaw* v. *Bradshaw* (1820), 1 Jac. & W. 647.
(*h*) Co. Litt. 3 b.
(*i*) Births and Deaths Registration Act, 1874 (37 & 38 Vict. c. 88), s. 7.
(*k*) *Udny* v. *Udny* (1869), L. R. 1 Sc. & Div. 441.
(*l*) Poor Law Amendment Act, 1834 (4 & 5 Will. 4, c. 76), s. 71.
(*m*) See p. 436, *ante*.
(*n*) Under 43 Eliz. c. 2 (*Westminster* v. *Gerrard* (1621), 2 Bulst. 346).
(*o*) 6 Edw. 7, c. 58, s. 13.
(*p*) 9 & 10 Vict. c. 93 (Lord Campbell's Act); *Dickinson* v. *North Eastern Rail. Co.* (1863), 2 H. & C. 735.

grandparents to receive compensation for his death depend upon similar principles (*q*).

SUB-SECT. 2.—*Proprietary.*

744. He can as a rule take no property in England by inheritance as heir-at-law through his parents (*r*), even though he has been legitimated by their subsequent marriage (*s*); and he transmits no heritable blood to his legitimate descendants so as to enable them to claim through him (*t*). No right of succession to realty.

There is one exception to this rule. When an owner of land dies intestate leaving two sons born of the same mother, the elder being a bastard, born before marriage, *i.e.*, the *bastard eigne* (*a*), or special bastard (*b*), and the younger legitimate, *i.e.*, the *mulier puisne* (*c*), if the elder enters and dies seised, the land, in case of his intestacy, descends not to the younger brother, but to the son (if any) of the elder (*d*). *Bastard eigne.*

745. Nor can the bastard succeed as next of kin to personalty save where he has been legitimated (*e*), or where the law of his father's domicile permits a bastard child to succeed (*f*). To personalty.

746. Nor, again, can any person succeed to a bastard as heir-at-law or next of kin unless he be a legitimate descendant (*g*). Therefore, in case of his intestacy without legitimate issue, his property devolves upon the Crown or the Duchy of Lancaster (*h*), subject to the rights of his widow (*i*). But if he be a member of a friendly, industrial, and provident society, a trade union, or a savings bank, and die intestate without nominating any person to receive the sums accruing in right of his membership, such sums may be paid to the person or persons who would have been entitled if he had been legitimate (*k*). Right of succession to bastard.

747. A bastard, however, is only disqualified from acquiring property by descent; he can always do so by purchase (*l*). Acquisition of property by bastard.

(*q*) Workmen's Compensation Act, 1906 (6 Edw. 7, c. 58), s. 13; *Clarke* v. *Carfin Coal Co.*, [1891] A. C. 412.

(*r*) Co. Litt. 123 a. He can take as heir-at-law to his legitimate descendants (Inheritance Act, 1833 (3 & 4 Will. 4, c. 106), s. 6).

(*s*) *Birtwhistle* v. *Vardill* (1839), 7 Cl. & Fin. 895. See p. 437, *ante*.

(*t*) *Birtwhistle* v. *Vardill*, *supra*, *per* TINDAL, C.J., at p. 937.

(*a*) Co. Litt. 244 a.

(*b*) See 2 Roll. Abr. 865.

(*c*) *Mulier* meaning one born of a wife (Co. Litt. 244 a).

(*d*) Although the *mulier puisne* be under a disability (*ibid.*). But the rule, being based on the *bastard eigne's* legitimacy under the civil law, does not apply if the mother was never married to the father (*ibid.* 245 a).

(*e*) *Re Goodman* (1881), 17 Ch. D. 266.

(*f*) *Doglioni* v. *Crispin* (1866), L. R. 1 H. L. 301.

(*g*) Co. Litt. 3 b. As to where he has been legitimated, see p. 437, *ante*.

(*h*) *Dyke* v. *Walford* (1846), 5 Moo. P. C. C. 434; *Megit* v. *Johnson* (1780), 2 Dougl. 542, *per* Lord MANSFIELD, at p. 548.

(*i*) See title DESCENT AND DISTRIBUTION.

(*k*) Provident Nominations and Small Intestacies Act, 1883 (46 & 47 Vict. c. 47), s. 8.

(*l*) And a conveyance to him and his heirs gives him a fee simple, though he can have no heirs but of his body (Co. Litt. 3 b; *Idle* v. *Cook* (1705), 1 P. Wms. 70, *per* HOLT, C.J., at p. 78; and see Com. Dig. tit. "Bastard," pp. 262, 263).

SECT. 3. Bastard's Rights and Liabilities.

With reference to his acquisition of property by gift *inter vivos* or by will the following points must be noted. He must be clearly designated as the object of bounty (*m*), and must be ascertained at the time the gift or will takes effect (*n*). Further, however close the natural relationship between him and the donor or testator may be, he is yet in law only a stranger in blood (*o*). Consequently equity will not aid the defective execution of a power by a parent in favour of a bastard child (*p*). Nor does it raise the presumption of a double portion (*q*), or of advancement (*r*), except where the donor has placed himself *in loco parentis* to the bastard (*s*). Succession and other duties also will be paid on the highest scale (*t*).

Part V.—Rights and Liabilities towards the Bastard.

SECT. 1.—*Of the Mother.*

Maintenance and custody.

748. The mother of a bastard child, as long as she is unmarried or a widow, is bound to maintain the child till it attains the age of sixteen, or, if a female, marries (*a*). Her obligation in this respect involves a right to its custody (*b*), which the court will protect by *habeas corpus* (*c*), and in determining any question as to custody the court will have primary regard to the wishes of the mother (*d*) even as against the father (*e*). She has also the right to determine the religion of her child (*f*).

Rights are personal to the mother.

749. She cannot by any contract with another person divest herself of her rights and liabilities in respect of her child (*g*). But they are

(*m*) *Hill and Simmonds* v. *Crook* (1871), L. R. 6 H. L. 265; *Earle* v. *Wilson* (1811), 17 Ves. 531; *Wilkinson* v. *Adam* (1812), 1 Ves. & B. 422. As to the cases in which a bastard is entitled to take under a gift by will to "child" or "children" and analogous cases, see under title WILLS.

(*n*) Therefore he cannot take a remainder limited before his birth (Co. Litt. 3 b, as explained by JAMES, L.J., in *Occleston* v. *Fullalove* (1874), 9 Ch. App. 147, at p. 166), nor if both begotten and born after the testator's death (*Crook* v. *Hill* (1876), 3 Ch. D. 773); but it is otherwise if he be at that time *en ventre sa mère* (*ibid.*).

(*o*) See *Atkinson* v. *Anderson* (1882), 21 Ch. D. 100, *per* HALL, V.-C., at p. 104.

(*p*) *Tudor* v. *Anson* (1754), 2 Ves. Sen. 582.

(*q*) *Ex parte Pye* (1811), 18 Ves. 140. See further title WILLS.

(*r*) *Tucker* v. *Burrow* (1865), 2 Hem. & M. 515. See further titles DESCENT AND DISTRIBUTION; WILLS.

(*s*) *Beckford* v. *Beckford* (1774), Lofft, 490.

(*t*) *Atkinson* v. *Anderson*, *supra*.

(*a*) Poor Law Amendment Act, 1834 (4 & 5 Will. 4, c. 76), s. 71.

(*b*) See *Barnardo* v. *McHugh*, [1891] A. C. 388, *per* Lord HERSCHELL, at p. 398, and *Humphrys* v. *Polak*, [1901] 2 K. B. 385, *per* STIRLING, L.J., at p. 389. The extent of her rights and obligations is open to doubt (see *Barnardo* v. *McHugh*, *supra*, per Lord HALSBURY, at p. 394), and it cannot be taken as established that they are the same as those of the father of a legitimate child (*ibid.*, *per* Lords HERSCHELL and FIELD, controverting the view of Lord ESHER in the same case, reported as *R.* v. *Barnardo* (*Jones's Case*), [1891] 1 Q. B. 194).

(*c*) *R.* v. *Nash* (1883), 10 Q. B. D. 454; *R.* v. *Hopkins* (1806), 7 East, 579.

(*d*) *Barnardo* v. *McHugh*, *supra*; *R.* v. *New* (1904), 20 T. L. R. 583; and compare *R.* v. *Bolton Union* (1892), 56 J. P. 149.

(*e*) *R.* v. *Soper* (1793), 5 Term Rep. 278. And see note (*y*), p. 441, *post*.

(*f*) *R.* v. *New*, *supra*, *per* COLLINS, M.R., at p. 584.

(*g*) *Humphrys* v. *Polak*, *supra*.

put an end to by her death. Her personal representatives are not bound to provide for the child (*h*), and any guardian appointed by her cannot act in opposition to the father (*i*).

SECT. 2.—*Of the Father.*

Maintenance.

750. The father of an illegitimate child is not recognised by the law of England for civil purposes (*k*). Therefore he is under no obligation to provide for the child, in the absence of any affiliation order (*l*), unless he has adopted it (*m*); and in such a case he remains bound until he gives clear notice of discontinuance (*n*). But he may make a binding contract (*o*) with the mother to contribute towards its maintenance (*p*). The contract is no bar to affiliation proceedings by the mother (*q*). The father is not discharged by his bankruptcy (*r*), nor, if the contract be for the maintenance of two bastards, by the death of one (*s*). The contract need not be in writing (*t*). The father may also be compelled to contribute to the support of the child by legal proceedings instituted by the mother (*u*) or by the guardians of the poor (*x*).

Right to custody.

751. The father has no right to the custody of the child during the lifetime of the mother (*y*), even though he is in a better position

(*h*) *Ruttinger* v. *Temple* (1863), 4 B. & S. 491.

(*i*) *Re Kerr* (1889), 24 L. R. Ir. 59.

(*k*) *R.* v. *Brighton* (1861), 1 B. & S. 447, *per* COCKBURN, C.J., at p. 451.

(*l*) See pp. 443 *et seq.*, *post.*

(*m*) *Hesketh* v. *Gowing* (1804), 5 Esp. 131.

(*n*) *Cameron* v. *Baker* (1824), 1 C. & P. 268; *Knowlman* v. *Bluett* (1873), L. R. 9 Exch. 1, 307.

(*o*) For forms of such contract, see Encyclopædia of Forms, Vol. II., pp. 431, 433.

(*p*) *Jennings* v. *Brown* (1842), 9 M. & W. 496; *Linnegar* v. *Hodd* (1848), 5 C. B. 437; *Hicks* v. *Gregory* (1849), 8 C. B. 378. The undertaking by the mother of the maintenance is sufficient consideration (*Jennings* v. *Brown, supra*; *Hicks* v. *Gregory, supra*; *contra, Furillio* v. *Crowther* (1826), 7 Dow. & Ry. (K. B.), 612; *Crowhurst* v. *Laverack* (1852), 8 Exch. 209, but see COCKBURN, C.J., on the latter case in *Smith* v. *Roche* (1859), 6 C. B. (N. S.) 223, at p. 234).

(*q*) *Follit* v. *Koetzow* (1860), 2 E. & E. 730.

(*r*) *Millen* v. *Whittenbury* (1808), 1 Camp. 428; and see further title BANKRUPTCY AND INSOLVENCY, p. 269, *ante*.

(*s*) *Smith* v. *Roche, supra.*

(*t*) It is not an agreement not to be performed within a year from the making of it under the Statute of Frauds (29 Car. 2, c. 3), s. 4 (*Knowlman* v. *Bluett* (1873), L. R. 9 Exch. 1, and see *McGregor* v. *McGregor* (1888), 21 Q. B. D. 424, *per* LINDLEY, L.J., at p. 432, and BOWEN, L.J., at p. 433, discussing *Knowlman* v. *Bluett*, in the Exchequer Chamber (1874), L. R. 9 Exch. 307, where the case was not decided on this point, but on the ground that when the mother had expended moneys on the maintenance of the child she was entitled to recover them, apart from any express contract, as moneys paid at the defendant's request, with which reasoning compare *Gore* v. *Hawsey* (1862), 3 F. & F. 509). A contract to support a child until "she can do for herself" is within the statute, and requires a written memorandum (*Farrington* v. *Donohoe* (1866), Ir. R. 1 C. L. 675).

(*u*) See pp. 443 *et seq.*, *post.*

(*x*) Bastardy Laws Amendment Act, 1873 (36 Vict. c. 9), s. 5; and this is so notwithstanding that the mother has married a man who has means to maintain the child (*Plymouth Guardians* v. *Gibbs*, [1903] 1 K. B. 177). See title POOR LAW.

(*y*) And hence, if he obtains possession of it by fraud, he will be compelled to restore it to the mother (*R.* v. *Soper* (1793), 5 Term Rep. 278; *R.* v. *Moseley* (1798), 5 East, 224, n.). But when the child has reached years of discretion, it will be allowed to elect between father and mother (*Re Lloyd* (1841), 3 Man. & G. 547).

SECT. 2. Of the Father.

to maintain it(*z*), and he cannot appoint a guardian for it by will(*a*). But after the mother's death he has a right to its custody (*b*), in spite of the fact that the mother has appointed a guardian (*c*); and whenever he is in lawful custody of the child the court will protect his right (*d*).

SECT. 3.—*Of the Husband of the Mother.*

Mother's husband.

752. The husband of any woman is bound to maintain her bastard children, born before the marriage, until they attain the age of sixteen or the mother dies (*e*). But he is not liable to maintain any bastard child born after the marriage, even though he continues to live with the mother (*f*).

SECT. 4.—*Of other Persons.*

Appointment of guardian by justices.

753. No other person appears to be under any liability for the maintenance of a bastard child (*g*), or to have any right to its custody (*h*). Where, however, the mother is dead, or of unsound mind, or in prison or penal servitude, any two justices may, if an affiliation order has been made on her application against the father, appoint (*i*) some person with his own consent to have the custody of the child, and to receive payment of the sums due under the order. Such person is to have the same powers as the mother in respect of the enforcement of all payments becoming due (*k*). The appointment may be revoked and a fresh appointment made at any time, and remains in force only for so long as the child is not chargeable to any parish or union. A duplicate of the appointment is to be sent by the clerk to the justices to the clerk to the guardians of the union or parish where the mother resided (*l*). If the person appointed misapplies any moneys paid to him under the order, or maltreats the child, he is liable to a fine not exceeding ten pounds (*m*).

(*z*) *Ex parte Knee*, 1 Bos. & P. (N. R.) 148.

(*a*) *Sleeman* v. *Wilson* (1871), L. R. 13 Eq. 36.

(*b*) Compare *Ex parte St. Mary Abbott's Guardians* (1887), 51 J. P. 740.

(*c*) *Re Kerr* (1889), L. R. 24 Ir. 59.

(*d*) *R.* v. *Cornforth* (1741), 2 Stra. 1162; and compare *Re Goodman* (1881), 17 Ch. D. 266, *per* JAMES, L.J., at p. 297.

(*e*) Poor Law Amendment Act, 1834 (4 & 5 Will. 4, c. 76), s. 57.

(*f*) *Jones* v. *Davies*, [1901] 1 K. B. 118, *per* KENNEDY, J., at p. 122. In this case there is also no liability on the putative father (*ibid.*).

(*g*) The statutes refer only to the liabilities of the mother, the father, and the mother's husband.

(*h*) See *Re Dellar* (1884), 28 Sol. Jo. 816, where the right of the maternal grandparents after the death of the mother to the custody of the child was raised, but not decided, the custody of the child being given to them on the ground that they had been wrongfully deprived of it.

(*i*) A form of appointment has been issued by the Local Government Board under the Bastardy Laws Amendment Act, 1873 (36 Vict. c. 9), s. 6.

(*k*) Poor Law Amendment Act, 1844 (7 & 8 Vict. c. 101), s. 5. The words in the section seem to exclude a power to recover arrears accruing due before the appointment.

(*l*) *Ibid.*

(*m*) *Ibid.*, s. 8.

Part VI.—Affiliation Proceedings.

SECT. 1.—*Requisites for Jurisdiction.*

SECT. 1. Requisites for Jurisdiction.

SUB-SECT. 1.—*As to the Child.*

754. Before an affiliation order under the Bastardy Acts (*n*) can be made against the putative father it is necessary for the child to be born alive (*o*).

Child born alive in England.

The child must also have been born in England (*p*).

SUB-SECT. 2.—*As to the Mother.*

755. The mother, if a single woman, may take proceedings (*q*), but where she has married after the child's birth it is impossible for her to obtain an order (*r*), whether she is living with her husband or not (*s*).

Mother single woman.

A married woman may also take proceedings (*t*), but it must be shown that the child is in fact a bastard (*u*), and that she is living separate from her husband (*a*). No order can be made whilst she is living with him (*b*).

Married woman.

The remedy is one personal to the mother, and, in the event of her death without having taken proceedings, no one else can do so (*c*).

Death of mother.

(*n*) These Acts are the Poor Law Amendment Act, 1844 (7 & 8 Vict. c. 101); the Bastardy Act, 1845 (8 & 9 Vict. c. 10); the Bastardy Laws Amendment Act, 1872 (35 & 36 Vict. c. 65); and the Bastardy Laws Amendment Act, 1873 (36 Vict. c. 9).

(*o*) *R.* v. *De Brouquens* (1811), 14 East, 277.

(*p*) Or on board a British ship (*Marshall* v. *Murgatroyd* (1870), L. R. 6 Q. B. 31). The Acts do not contemplate the case of a child born a bastard in a foreign country (*R.* v. *Blane* (1849), 13 Q. B. 769, *per* ERLE, J., at p. 774), and therefore no order can be made in respect of such child, even though it was in fact begotten in England, and was brought back shortly after its birth abroad (*ibid.*). But if the child be born in Scotland, the mother may take proceedings against the putative father here, if he would have been amenable to the jurisdiction in case the child had been born in England (Summary Jurisdiction (Process) Act, 1881 (44 & 45 Vict. c. 24), s. 6). Conversely, if the child is born here, an order can be made though the child was begotten abroad (*Hampton* v. *Rickard* (1874), 43 L. J. (M. C.) 133).

(*q*) Bastardy Laws Amendment Act, 1872 (35 & 36 Vict. c. 65), s. 3.

(*r*) *Stacey* v. *Lintell* (1878), 4 Q. B. D. 291; even though she took out a summons before her marriage, and was prevented from serving it by the default of the putative father (*Tozer* v. *Lake* (1879), 4 C. P. D. 322). The marriage of the mother does not prevent the guardians from obtaining an affiliation order against the putative father (*Plymouth Guardians* v. *Gibbs*, [1903] 1 K. B. 177); see title POOR LAW.

(*s*) *Peatfield* v. *Childs* (1899), 63 J. P. 117.

(*t*) The words in s. 3 of the Bastardy Laws Amendment Act, 1872 (35 & 36 Vict. c. 65), are "any single woman," but are covered by decisions on the same words in previous Acts (*R.* v. *Luffe* (1807), 8 East, 193; *R.* v. *Collingwood* (1848), 12 Q. B. 681; *R.* v. *Pilkington* (1853), 2 E. & B. 546). And see *Stacey* v. *Lintell*, *supra*, *per* LUSH, J., at p. 294; *Webb* v. *Murrel* (1904), 68 J. P. 104.

(*u*) *R.* v. *Luffe*, *supra*. As to this see pp. 428 *et seq.*, *ante*.

(*a*) See cases in note (*t*), above. But the separation must be *bonâ fide*, and not merely colourable (*Jones* v. *Davies*, [1901] 1 K. B. 118).

(*b*) *Jones* v. *Davies*, *supra*, *per* LAWRANCE, J., at p. 120.

(*c*) *R.* v. *Armitage* (1872), L. R. 7 Q. B. 773, *per* HANNEN, J., at p. 775

SECT. 1. Requisites for Jurisdiction.

SUB-SECT. 3.—*As to the Putative Father.*

Putative father within the jurisdiction.

756. The presence of the putative father (*d*) in England (*e*) is necessary for the jurisdiction to attach (*f*), or at any rate service must have been effected within the jurisdiction (*g*). There are special provisions applicable where he is a soldier (*h*).

No proceedings, it would seem, can be taken after his death (*i*).

SECT. 2.—*The Application.*

SUB-SECT. 1.—*Requisites for the Application.*

Application.

757. The application (*k*) is to be made to any one (*l*) justice of the peace (*m*) acting for the petty sessional division (*n*) of the county or for the city, borough, or place in which the mother resides (*o*), and nowhere else (*p*).

Time for application.

An application may be made at any time before the birth (*q*), in

(*d*) It would seem on principle that a boy under fourteen cannot have an order made against him as a putative father, seeing that he is not in law capable of sexual intercourse. See title CRIMINAL LAW AND PROCEDURE.

(*e*) Where the putative father resides in Scotland, proceedings may be taken in Scotland, though the child was born in England, under the Summary Jurisdiction (Process) Act, 1881 (44 & 45 Vict. c. 24), s. 6. This Act, however, does not apply to Ireland.

(*f*) *Berkley* v. *Thompson* (1884), 10 App. Cas. 45, *per* Lord SELBORNE, at p. 49.

(*g*) See pp. 446, 447, *post*.

(*h*) See the Army Act, 1881 (44 & 45 Vict. c. 58), s. 145, and p. 447, *post*.

(*i*) The Bastardy Acts contain no provisions to meet this case, compare note (*n*), p. 451, *post*.

(*k*) The forms of application, as for all other proceedings in bastardy, are issued by the Local Government Board under the Bastardy Laws Amendment Act, 1873 (36 Vict. c. 9), s. 6. But a servile adherence to these forms is unnecessary (*Bell* v. *Clubbs* (1892), 8 T. L. R. 296, *per* WILLS, J., at p. 298).

(*l*) If application be made to several justices, it is one application only (*R.* v. *Robinson*, [1898] 1 Q. B. 734). This is sometimes done to avoid the difficulty which arises when the justice to whom application is made dies before the hearing. See note (*n*), p. 446, *post*. In the case of twins, it seems advisable to make separate applications in respect of each child.

(*m*) The application must be to him personally, not to the clerk to the justices (*Staples* v. *Staples* (1879), 41 L. T. 347), though the clerk to the justices may be the mother's agent for the purpose of laying the application before him (*ibid.*, *per* HUDDLESTON, B., at p. 350).

(*n*) This is defined in the Bastardy Act, 1845 (8 & 9 Vict. c. 10), s. 10, as including any division of a county, riding, or division having a separate commission of the peace in which one or more petty sessions have been or shall be usually held, or any division for the holding of special sessions formed or to be formed under the Division of Counties Act, 1828 (9 Geo. 4, c. 43), and the Petty Sessional Divisions Act, 1836 (6 & 7 Will. 4, c. 12). See title MAGISTRATES.

(*o*) Bastardy Laws Amendment Act, 1872 (35 & 36 Vict. c. 65), s. 3; even though her residence be temporary (*Lawrence* v. *Ingmire* (1869), 20 L. T. 391), and for the express purpose of giving the justice jurisdiction (*R.* v. *Hughes* (1857), 26 L. J. (M. C.) 133), provided that it is *bonâ fide* and not merely colourable (*R.* v. *Myott* (1863), 32 L. J. (M. C.) 138, where the applicant, after failing in her own petty sessional division, removed to a neighbouring borough, where she was told she would have a better chance).

(*p*) *Vevers* v. *Mains* (1888), 4 T. L. R. 724.

(*q*) Bastardy Laws Amendment Act, 1872 (35 & 36 Vict. c. 65), s. 3; but no order can be made till the child is born (note (*o*), p. 443, *ante*).

which case the woman makes a deposition on oath, stating who is the father of the expected child (*r*), or at any time within twelve months from the birth (*s*).

If the putative father has ceased to reside in England before the birth (*t*), or within twelve months after, the application may be made within twelve months after his return (*a*).

After the expiry of the above periods no application can be made except where the putative father has, within the twelve months after the child's birth, paid money for its maintenance (*b*).

When application exhausted.

If the application is made within the proper time, it is sufficient to support the issue of any number of summonses (*c*), even where the time for a new application has expired (*d*). But if any summons founded on the application is heard and dismissed on the merits (*e*), that application is exhausted (*f*).

SUB-SECT. 2.—*Second or Further Applications.*

Second application.

758. The fact that a summons has been dismissed at petty sessions after a hearing on the merits is no bar to a second application (*g*) or any number of applications (*h*), provided that the second or further application be made within the proper time (*i*). The reason for this is that no appeal lies against a refusal to make an affiliation order (*j*). But the justices on the second hearing should attach great weight to the prior decision, and should treat the matter as *res judicata*, unless it be shown that what may be called the first trial was for some reason or other not fair (*k*).

But where on appeal to quarter sessions there is a hearing on the

(*r*) Bastardy Laws Amendment Act, 1872 (35 & 36 Vict. c. 65), s. 3. The absence of a written deposition is an irregularity which may be waived at the hearing (*R.* v. *Fletcher* (1871), L. R. 1 C. C. R. 320).

(*s*) Bastardy Laws Amendment Act, 1872 (35 & 36 Vict. c. 65), s. 3; and see *Ex parte Harrison* (1852), 16 Jur. 726.

(*t*) *R.* v. *Evans*, [1896] 1 Q. B. 228.

(*a*) Bastardy Laws Amendment Act, 1872 (35 & 36 Vict. c. 65), s. 3.

(*b*) *Ibid.* The fact of the payment should be proved on oath at the application, but the absence of proof on oath is an irregularity that can be waived (*R.* v. *Berry* (1859), 28 L. J. (M. C.) 86). No corroboration is requisite on this point (*Hodges* v. *Bennett* (1860), 5 H. & N. 625). It would seem that the payment must be voluntary, for a payment made under a previous affiliation order which has expired (*Williams* v. *Davies* (1883), 11 Q. B. D. 74, *per* FIELD, J., at p. 78; *contra*, *Pearson* v. *Heys* (1881), 7 Q. B. D. 260, *per* MANISTY, J., at p. 263), or under an order obtained by guardians under the Bastardy Laws Amendment Act, 1873 (36 Vict. c. 9), s. 5 (*Billington* v. *Cyples* (1885), 52 L. T. 854), is insufficient.

(*c*) *Ex parte Fielding* (1861), 25 J. P. 759.

(*d*) *R.* v. *Lancashire Justices* (1874), 29 L. T. 886; *Potts* v. *Cumbridge* (1858), 8 E. & B. 847; *R.* v. *Chugg* (1870), 22 L. T. 556.

(*e*) For what is a hearing on the merits, see note (*l*), p. 446, *post*.

(*f*) *R.* v. *Thomas* (1863), 8 L. T. 460; *R.* v. *Robinson*, [1898] 1 Q. B. 734; *Staples* v. *Staples* (1879), 41 L. T. 347.

(*g*) *R.* v. *Machen* (1849), 14 Q. B. 74; *Williams* v. *Davies*, *supra*, *per* DENMAN, J., at p. 76; *R.* v. *Glynne* (1871), L. R. 7 Q. B. 16, *per* LUSH, J., at p. 25; *Ex parte Westerman* (1851), 16 L. T. (o. s.) 420.

(*h*) *R.* v. *Hall* (1887), 57 L. T. 306.

(*i*) *R.* v. *Thomas*, *supra*; *R.* v. *Hall*, *supra*.

(*j*) *R.* v. *Machen*, *supra*, *per* Lord DENMAN, at p. 79.

(*k*) *R.* v. *Machen*, *supra*, at p. 80; *R.* v. *Gaunt* (1867), L. R. 2 Q. B. 466, *per* BLACKBURN, J., at p. 468, explaining *R.* v. *Herrington* (1864), 12 W. R. 420. In *R.* v. *Gaunt*, *supra*, the previous dismissal had been obtained by perjured evidence.

SECT. 2. The Application.

merits (*l*), and an affiliation order is quashed, the decision is final, and no fresh application can be made (*m*).

SECT. 3.—*The Summons.*

SUB-SECT. 1.—*Issue.*

Issue of summons.

759. The summons must be issued by the justice to whom the application has been made (*n*). But it need not be issued at the time of application (*o*).

The summons orders the defendant to appear at a petty session to be held at least six days after the date of the application (*p*), or, if the application be made before the birth, on a day after the time when the child is expected to be born (*q*).

SUB-SECT. 2.—*Service.*

Service of summons.

760. The summons must be served at least six days before the hearing (*r*), and service can only be effected within the jurisdiction (*s*).

When defendant cannot be found.

If personal service cannot be effected (*a*), the summons may be served by being left at the defendant's last place of abode (*b*). This does not necessarily mean his last known place of abode (*c*), and service there is not sufficient (*d*) when he has left it (*e*) and taken up his abode elsewhere (*f*).

(*l*) A hearing on the merits covers decisions that the evidence produced did not satisfy the court, or that the respondent produced insufficient or no evidence of corroboration, or that the case was defective in any other way (*R.* v. *Glynne* (1871), L. R. 7 Q. B. 16, *per* BLACKBURN, J., at p. 23, and MELLOR, J., at p. 25; *R.* v. *Herrington* (1864), 12 W. R. 420).

(*m*) *R.* v. *Glynne*, *supra*. But if it be quashed otherwise than on the merits, a fresh application can be made (*R.* v. *May* (1880), 5 Q. B. D. 382), though probably the magistrates may refuse to hear it till the costs of the appeal have been paid (*ibid.*, *per* LUSH, J., at p. 385).

(*n*) Hence, if he dies before issuing the summons, the application is exhausted (*R.* v. *Pickford* (1861), 1 B. & S. 77). To escape this difficulty, separate applications may be made to several justices, but they are in effect one application, and only one summons can be issued (*R.* v. *Robinson*, [1898] 1 Q. B. 734). But if the summons be issued by another justice than the one to whom the application was made, this is an irregularity that may be waived by appearance at the hearing without objection (*R.* v. *Fletcher* (1884), 48 J. P. 407).

(*o*) *Potts* v. *Cumbridge* (1858), 8 E. & B. 847; *R.* v. *Chugg* (1870), 22 L. T. 556.

(*p*) Bastardy Laws Amendment Act, 1872 (35 & 36 Vict. c. 65), s. 3.

(*q*) Bastardy Act, 1845 (8 & 9 Vict. c. 10), s. 4.

(*r*) Bastardy Laws Amendment Act, 1872 (35 & 36 Vict. c. 65), s. 4.

(*s*) *R.* v. *Lightfoot* (1856), 6 E. & B. 822. The Summary Jurisdiction (Process) Act, 1881 (44 & 45 Vict. c. 24), does not enable the summons to be served in Scotland (*Berkley* v. *Thompson* (1884), 10 App. Cas. 45), but proceedings may be taken there (*ibid.*, s. 6). See note (*e*), p. 444, *ante*.

(*a*) As to the mode of personal service, see title CRIMINAL LAW AND PROCEDURE.

(*b*) Bastardy Laws Amendment Act, 1872 (35 & 36 Vict. c. 65), s. 4.

(*c*) *R.* v. *Farmer*, [1892] 1 Q. B. 637; "If a man goes to a new place of abode, his last place of abode is that to which he goes and in which he is abiding" (*ibid.*, *per* Lord ESHER, at p. 640).

(*d*) *R.* v. *Farmer*, *supra*. But *bonâ fide* service there is *primâ facie* good (*R.* v. *Evans* (1850), 19 L. J. (M. C.) 151).

(*e*) He must not, however, have left for some temporary purpose (*R.* v. *Brown* (1859), 1 L. T. 29), or with a view of evading service (*R.* v. *Higham* (1857), 7 E. & B. 557). See also *R.* v. *Farmer*, *supra*, *per* Lord ESHER, at p. 639, and *R.* v. *De Winton* (1889), 53 J. P. 292.

(*f*) But he must in fact have acquired a new place of abode to render the service

The last place of abode for the purpose of service must be in England (*g*). If therefore the defendant goes to a foreign country and takes up his residence there, his last place of abode is the place where he is residing, and not the place where he last resided in England (*h*). But service at the latter place will be good until he has acquired a permanent residence abroad (*i*), notwithstanding the fact that at the time of service he was not within the jurisdiction (*k*).

When defendant abroad.

761. Where the defendant is a soldier quartered out of the petty sessional division in which the proceedings are instituted, the summons must be served on his commanding officer, and the service is not valid unless at the same time there is deposited with the commanding officer a sum of money, to be added to the applicant's costs in case of success, sufficient to pay the defendant's expenses of going and returning. Further, the soldier must not be under orders for foreign service (*l*).

Soldiers.

SECT. 4.—*The Hearing.*

SUB-SECT. 1.—*In General.*

762. The hearing takes place before a petty sessional court (*m*) at least six days (*n*) and within forty days after the service of the summons (*o*). But if the summons was applied for before the birth, the hearing takes place within two months after the birth, and the forty days limit does not apply (*p*).

Time of hearing.

The first hearing must take place within the period above specified (*q*). But the justices may adjourn the hearing as often (*r*) and for as long a period (*s*) as they think fit. Where a summons has been applied for before birth, if, on the day named for the hearing in the summons, the child has not been born, or if the

Adjournment.

bad. Compare *R.* v. *Farmer*, [1892] 1 Q. B. 637, with *R.* v. *Webb*, [1896] 1 Q. B. 487, and see *R.* v. *Davis* (1853), 22 L. J. (M. C.) 143; *R.* v. *Damarell* (1867), L. R. 3 Q. B. 50; *R.* v. *Lee* (1888), 58 L. T. 384.

(*g*) *R.* v. *Farmer*, *supra*.

(*h*) *Ibid.*

(*i*) *R.* v. *Webb*, *supra*; *R.* v. *Davis*, *supra*; *R.* v. *Damarell*, *supra*; *R.* v. *Lee*, *supra*; *R.* v. *De Winton* (1889), 53 J. P. 292.

(*k*) *R.* v. *Webb*, *supra*, explaining and distinguishing the *dictum* of Lord SELBORNE in *Berkley* v. *Thompson* (1884), 10 App. Cas. at p. 49.

(*l*) Army Act, 1881 (44 & 45 Vict. c. 58), s. 145 (3).

(*m*) Bastardy Laws Amendment Act, 1872 (35 & 36 Vict. c. 65), s. 4. As to the constitution of such a court, see title MAGISTRATES. The justice who granted the summons must be a member of the court (*R.* v. *Pickford* (1861), 1 B. & S. 77, where he died before the hearing).

(*n*) Bastardy Laws Amendment Act, 1872 (35 & 36 Vict. c. 65), s. 4. This is only necessary where the defendant does not appear.

(*o*) Poor Law Amendment Act, 1844 (7 & 8 Vict. c. 101), s. 4.

(*p*) Bastardy Act, 1845 (8 & 9 Vict. c. 10), s. 4.

(*q*) Poor Law Amendment Act, 1844 (7 & 8 Vict. c. 101), s. 4; Bastardy Act, 1845 (8 & 9 Vict. c. 10), s. 4.

(*r*) Poor Law Amendment Act, 1844 (7 & 8 Vict. c. 101), s. 4. The adjournment is purely a matter of discretion (*R.* v. *Brown* (1859), 1 L. T. 29). If at the time appointed for the hearing only one justice happen to be present, he has power to adjourn the hearing (Bastardy Laws Amendment Act, 1873 (36 Vict. c. 9), s. 7).

(*s*) *Ex parte Harrison* (1852), 19 L. T. (O. S.) 114.

SECT. 4. The Hearing.

mother has not recovered from her confinement, the justices may adjourn the hearing as often as may be necessary, provided that the first actual hearing takes place within two months of the birth (*a*).

The justices may amend at the hearing any informality in the summons (*b*), and any irregularity of process (*c*) may be waived by the defendant's appearing without objection.

SUB-SECT. 2.—*Parties.*

Mother's presence essential.

763. Either party may appear by counsel or attorney (*d*). The mother must herself be present at the hearing, as her evidence is essential (*e*). If therefore she die before the hearing, the proceedings are at an end (*f*). The defendant's presence is unnecessary (*g*), but, if he do not appear personally or by counsel or attorney, no order can be made against him unless the summons was duly served (*h*) six days at least before the hearing (*i*).

SUB-SECT. 3.—*Evidence.*

Evidence of mother.

764. The evidence of the mother (*k*) as to the paternity of the child is essential (*l*), but requires corroboration (*m*) in some material particular (*n*). In cross-examination she may be questioned as to her connection with other men, but her answer cannot be contradicted (*o*), except where it is sought to show that another man might be the father of the child (*p*).

(*a*) Bastardy Act, 1845 (8 & 9 Vict. c. 10), s. 4.

(*b*) *Bell* v. *Clubbs* (1892), 8 T. L. R. 296.

(*c*) *R.* v. *Berry* (1859), 28 L. J. (M. C.) 86; *R.* v. *Fletcher* (1871), L. R. 1 C. C. R. 320; *R.* v. *Simmonds* (1859), 28 L. J. (M. C.) 183; *R.* v. *Fletcher* (1884), 48 J. P. 407.

(*d*) Bastardy Act, 1845 (8 & 9 Vict. c. 10), s. 7.

(*e*) Bastardy Laws Amendment Act, 1872 (35 & 36 Vict. c. 65), s. 4. As the hearing must take place in open court (Summary Jurisdiction Act, 1879 (42 & 43 Vict. c. 49), s. 20), it would seem that it cannot be adjourned to her house if she be too ill to attend.

(*f*) *R.* v. *Armitage* (1872), L. R. 7 Q. B. 773.

(*g*) Bastardy Act, 1845 (8 & 9 Vict. c. 10), s. 7. See *R.* v. *Shipperbottom* (1847), 10 Q. B. 514.

(*h*) As to service, see p. 446, *ante*.

(*i*) Bastardy Laws Amendment Act, 1872 (35 & 36 Vict. c. 65), s. 4.

(*k*) Where she is a married woman, the restrictions on her evidence mentioned at pp. 429 *et seq.*, *ante*, must be borne in mind.

(*l*) Bastardy Laws Amendment Act, 1872 (35 & 36 Vict. c. 65), s. 4; *R.* v. *Armitage*, *supra*.

(*m*) But her testimony as to the payment of money by the defendant for the maintenance of her child needs no corroboration (*Hodges* v. *Bennett* (1860), 5 H. & N. 625).

(*n*) Bastardy Laws Amendment Act, 1872 (35 & 36 Vict. c. 65), s. 4. Any acts of familiarity may be sufficient, even though they took place before the child could have been begotten (*Cole* v. *Manning* (1877), 2 Q. B. D. 611), and acts innocent in themselves may be coloured by a difference in the social position of the parties (*Harvey* v. *Anning* (1903), 87 L. T. 687). So too an admission of paternity (*R.* v. *Pearcy* (1852), 17 Q. B. 902; *Hill* v. *Denmark* (1895), 59 J. P. 345), and any conduct pointing to the probability of the defendant being the father (*Reffell* v. *Morton* (1906), 70 J. P. 347). See also title EVIDENCE.

(*o*) *R.* v. *Gibbons* (1862), 31 L. J. (M. C.) 98.

(*p*) *Garbutt* v. *Simpson* (1863), 32 L. J. (M. C.) 186.

The defendant is a competent witness on his own behalf (*q*), and he may be compelled to give evidence on behalf of the complainant (*r*), provided that he has been duly summoned (*s*). If he gives evidence, whether voluntarily or under compulsion, the justices may compel him, under pain of commitment, to answer any relevant question (*t*).

Evidence of defendant.

765. Any other evidence may be tendered by either party (*a*), and the attendance of any witness may be secured by summons to be granted by any justice (*b*). Should the witness after such summons neglect or refuse to appear at the hearing, the same justice, on proof of personal service of the summons and of payment or tender of conduct money, may by warrant under his hand and seal require the witness to be brought before him or the court before whom the case is to come (*c*). If the witness persist in his refusal to give evidence, the justices may commit him to prison for not more than fourteen days, or until he shall sooner submit himself to be examined, when the order of any of the justices will be a sufficient warrant for his discharge (*d*).

Witnesses.

Any order obtained on the application of guardians (*e*) is *primâ facie* evidence upon a subsequent application by the mother that the man upon whom the order is made is the father of the child (*f*).

SECT. 5.—*The Order.*

SUB-SECT. 1.—*Form and Purport.*

766. The justices may, at the hearing, adjudge the defendant to be the putative father of the child, and if they see fit, having regard to all the circumstances of the case (*g*), may make an order (*h*) on him for the payment to the mother or any person appointed to have the custody of the child (*i*) of a weekly sum, not exceeding five shillings (*j*), for the maintenance and education of the child (*k*), and of the expenses incidental to its birth, and of its funeral

Order for payment.

(*g*) For proceedings in bastardy are in the nature of civil proceedings (*Galliard* v. *Laxton* (1862), 2 B. & S. 363, *per* WIGHTMAN, J., at p. 372, and *Cattell* v. *Ireson* (1858), E. B. & E. 91, *per* Lord CAMPBELL, at p. 98).

(*r*) *R.* v. *Flavell* (1884), 14 Q. B. D. 364, *per* A. L. SMITH, J., at p. 367.

(*s*) As to the mode of summoning, see next paragraph.

(*t*) *R.* v. *Flavell*, *supra*.

(*a*) Bastardy Laws Amendment Act, 1872 (35 & 36 Vict. c. 65), s. 4.

(*b*) Poor Law Amendment Act, 1844 (7 & 8 Vict. c. 101), s. 70.

(*c*) *Ibid.*

(*d*) *Ibid.* The provision as to commitment applies to any witness, whether he is present voluntarily or under compulsion (*R.* v. *Flavell*, *supra*).

(*e*) As to this, see title POOR LAW.

(*f*) Bastardy Laws Amendment Act, 1873 (36 Vict. c. 9), s. 5 (5).

(*g*) The existence of a contract made by the putative father for the support of the child is a circumstance to be taken into consideration (*Follit* v. *Koetzow* (1860), 2 E. & E. 730).

(*h*) The order is made when the justices pronounce their decision in court, not when the formal order is drawn up (*Ex parte Johnson* (1863), 3 B. & S. 947). No order can be made before the birth of the child ; see note (*o*), p. 443, *ante*.

(*i*) See p. 442, *ante*.

(*j*) The amount may be reduced on appeal to quarter sessions (Bastardy Laws Amendment Act, 1872 (35 & 36 Vict. c. 65), s. 9).

(*k*) The omission of these words renders the order invalid (*R.* v. *Padbury* (1879), 5 Q. B. D. 126), as the Bastardy Orders Act, 1880 (43 & 44 Vict. c. 32), only applies to orders made before its passing (*ibid.*, s. 1).

SECT. 5. The Order.

expenses if it has died before the making of the order, and of the costs incurred in obtaining the order (*l*).

Form of order.

The order, when drawn up (*m*), should set forth all facts necessary to give the court jurisdiction (*n*), or to show the scope of the order (*o*). It is therefore desirable to follow substantially the forms issued by the Local Government Board (*p*), as the omission of any material particular (*q*) may be fatal (*r*). But if the order as drawn up does not embody the terms of the order actually made by the court, it is a nullity (*s*), and the mother is entitled to apply to the justices (*t*) for a correct copy of their decision without first getting the incorrect order quashed and instituting fresh proceedings (*u*).

SUB-SECT. 2.—*Operation.*

From what date payments calculated.

767. When the application is made before birth, or within two months afterwards, the weekly sum may be calculated from the birth (*x*); but in other cases it is calculated from the date of the order (*a*).

(*l*) Bastardy Laws Amendment Act, 1872 (35 & 36 Vict. c. 65), s. 4. There is, however, no power to make the mother, if unsuccessful, pay the costs of the defendant (*R.* v. *Machen* (1849), 14 Q. B. 74, *per* Lord DENMAN, C.J., at p. 80), but where the first hearing proves abortive, the justices need not hear a second application till the defendant's costs on the first application have been paid (*R.* v. *Hinchliff* (1847), 10 Q. B. 356, where the mother obtained an order on the first application, but abandoned it; *R.* v. *Lanyon* (1872), 27 L. T. 355). And compare *R.* v. *May* (1880), 5 Q. B. D. 382, *per* LUSH, J., at p. 385.

(*m*) This may be done and the signatures of the justices affixed at any time after adjudication (*Ex parte Johnson* (1863), 3 B. & S. 947).

(*n*) See *R.* v. *Rose* (1845), 15 L. J. (M. C.) 6, where the order did not show on the face of it that it was applied for within forty days of the service of the summons; *R.* v. *Whittles* (1849), 13 Q. B. 248, where the petty sessional division was incorrectly described; *R.* v. *Read* (1839), 9 Ad. & El. 619, where the order stated that the mother's evidence had been corroborated, but omitted the words "in some material particular"; *R.* v. *Grafton* (1848), 17 L. J. (M. C.) 125, where the order stated that the defendant had appeared, but omitted the words "in the presence and hearing of the said"; and compare *R.* v. *Brisby* (1849), 18 L. J. (M. C.) 157. But it is sufficient to state that the solicitor of the putative father was present, omitting any reference to the putative father himself (*R.* v. *Shipperbottom* (1847), 10 Q. B. 514).

(*o*) *R.* v. *Padbury* (1879), 5 Q. B. D. 126.

(*p*) See note (*k*), p. 444, *ante*.

(*q*) It need not be stated that the evidence was given on oath (*R.* v. *Shipperbottom*, *supra*).

(*r*) See examples in note (*n*), *supra*. But where the omission is immaterial, the order is valid (*R.* v. *Milner* (1845), 14 L. J. (M. C.) 157; *Ex parte Boynton* (1850), 1 L. M. & P. 12; *R.* v. *Cheshire Justices* (1845), 15 L. J. (M. C.) 3).

(*s*) *R.* v. *Lanyon* (1872), 27 L. T. 355; *R.* v. *Brisby* (1849), 18 L. J. (M. C.) 157.

(*t*) But they must be the same justices (*R.* v. *Lanyon*, *supra*).

(*u*) *R.* v. *Lanyon*, *supra*; *Wilkins* v. *Hemsworth* (1838), 7 Ad. & El. 807. So, where an order is partly invalid, the mother may enforce the order so far as it is valid without getting the invalid part quashed, provided that she gives notice to the putative father of abandonment of such part (*R.* v. *Green* (1851), 20 L. J. (M. C.) 168; *R.* v. *Fletcher* (1884), 48 J. P. 407).

(*x*) Bastardy Laws Amendment Act, 1872 (35 & 36 Vict. c. 65), s. 4.

(*a*) This is the date named in the order issued by the Local Government Board. It is doubtful whether the payment can be calculated from the date of the application. See *R.* v. *Padbury*, *supra*, where the order directed payment from that date, but was held bad on another ground. In that case the application was made within two months of the birth. The Poor Law Amendment Act, 1844 (7 & 8

SECT. 5.
The Order.

The order remains in force till the child attains the age of thirteen or dies, but the justices may in the order direct that the payments are to continue till the child attains sixteen (*b*). At the same time they have a discretion to fix a shorter period in the order (*c*). When the period named in the order has elapsed, it ceases to have any force or validity (*d*), and no fresh application can be made (*e*).

Duration of order.

The sums payable under the order are to be paid to the mother so long as she lives, and is of sound mind and not in prison or penal servitude (*f*), unless the child becomes chargeable to the parish, when the guardians may apply for payment to be made to them (*g*).

To whom payments to be made.

The marriage of the mother after the date of the order (*h*) does not put an end to the order (*i*), even though her husband be able to maintain the child (*k*). After her death, or whilst she is of unsound mind or in prison or penal servitude, payment will be made to the person appointed to have the custody of the child (*l*), or to the guardians (*m*), as the case may be.

Marriage or death etc. of mother.

The death of the putative father puts an end to the order (*n*), but his discharge in bankruptcy or a composition or scheme of arrangement with his creditors has no effect, except to such an extent and under such conditions as the court expressly orders (*o*).

Death or bankruptcy of father.

The order cannot be put an end to by the agreement of the parties (*p*).

768. Where the putative father is a soldier, a copy of any order made against him must be sent to the Secretary of State, who may order not more than sixpence per day to be deducted from the daily pay of any non-commissioned officer not below the rank of sergeant, and not more than threepence per day from the daily pay of any

Soldier.

Vict. c. 101), s. 3, expressly enabled payment to be ordered from the date of application, even where the order was made long afterwards (*Ex parte Harrison* (1852), 16 Jur. 726; *R.* v. *Curme* (1868), 18 L. T. 559), but this section was repealed by the Bastardy Laws Amendment Act, 1872 (35 & 36 Vict. c. 65), s. 2, and the section replacing it (*ibid.*, s. 3) is silent on the point.

(*b*) Bastardy Laws Amendment Act, 1872 (35 & 36 Vict. c. 65), s. 5.

(*c*) *Pearson* v. *Heys* (1881), 7 Q. B. D. 260, where the order was till the child attained the age of sixteen or the mother married.

(*d*) Bastardy Laws Amendment Act, 1872 (35 & 36 Vict. c. 65), s. 5, except for the purpose of recovering arrears (*ibid.*).

(*e*) *Williams* v. *Davies* (1883), 11 Q. B. D. 74.

(*f*) Poor Law Amendment Act, 1844 (7 & 8 Vict. c. 101), s. 5.

(*g*) Bastardy Laws Amendment Act, 1872 (35 & 36 Vict. c. 65), s. 7.

(*h*) As to the effect of her marriage before the order, see p. 443, *ante*.

(*i*) *Sotheron* v. *Scott* (1881), 6 Q. B. D. 518.

(*k*) *Hardy* v. *Atherton* (1881), 7 Q. B. D. 264.

(*l*) Poor Law Amendment Act, 1844 (7 & 8 Vict. c. 101), s. 5. See p. 442, *ante*.

(*m*) *Ibid.*, s. 7.

(*n*) This seems to follow from the fact that the Bastardy Acts deal throughout with the liability of the putative father as a personal one and contain no provisions applicable in case of his death.

(*o*) Bankruptcy Act, 1890 (53 & 54 Vict. c. 71), ss. 3 (12), 10. See further title BANKRUPTCY AND INSOLVENCY, pp. 83, 269, *ante*.

(*p*) *Griffith* v. *Evans* (1882), 46 L. T. 417.

SECT. 5. The Order.

other soldier, and appropriated in liquidation of the sum payable under the order (*q*).

Clergyman.

769. Where the putative father is a clergyman, any preferment held by him must be declared vacant by the bishop without further trial within twenty-one days from the order becoming conclusive, and he becomes incapable of holding further preferment (*r*).

SUB-SECT. 3.—*Enforcement.*

Enforcement of order.

770. If the putative father make default in his payments under the order, application on oath or affirmation may be made, at any time after the expiration of one calendar month from the making of the order, to any one justice for a warrant (*s*) to bring him before any two justices (*t*). If he then refuse or neglect to pay all arrears due together with the costs of the proceedings, the justices may (*a*) issue a distress warrant (*b*), and may remand him in custody, unless he gives sufficient security by way of recognisance or otherwise to appear, till the return to the warrant (*c*). In default of distress (*d*), he may be imprisoned for not more than three months (*e*), but he is entitled to be released on payment of the arrears, and all costs and charges connected therewith (*f*).

Soldier.

771. Where the father is a soldier, no execution is to issue against his person, pay, arms, ammunition, equipments, instruments, regimental necessaries, or clothing (*g*).

(*q*) Army Act, 1881 (44 & 45 Vict. c. 58), s. 145 (2).

(*r*) Clergy Discipline Act, 1892 (55 & 56 Vict. c. 32), s. 1. See further title ECCLESIASTICAL LAW.

(*s*) The officer executing the warrant must have it in his possession, even though he is not asked to produce it (*Galliard* v. *Laxton* (1862), 2 B. & S. 363). The arrest cannot be effected on a Sunday (Sunday Observance Act, 1677 (29 Car. 2, c. 7)). There does not appear to be any objection to the issue of a summons instead of a warrant so long as the defendant appears to it.

(*t*) Bastardy Laws Amendment Act, 1872 (35 & 36 Vict. c. 65), s. 4.

(*a*) It is not clear whether the justices have a discretion to enforce payment after the mother's marriage. See *Davies* v. *Evans* (1882), 9 Q. B. D. 238, where GROVE, J., held that they had, and HUDDLESTON, B., that they had not; *Hardy* v. *Atherton* (1881), 7 Q. B. D. 264, *per* HUDDLESTON, B., at p. 267, explaining the words of FIELD, J., in *Sotheron* v. *Scott* (1881), 6 Q. B. D. 518, at p. 520, and *per* HAWKINS, J., at p. 268, disapproving the *dictum* of LUSH, J., in favour of the discretion in *Stacey* v. *Lintell* (1879), 4 Q. B. D. 291, at p. 295. But they have a discretion to postpone the issue of the warrant (Summary Jurisdiction Act, 1879 (42 & 43 Vict. c. 49), s. 21, made applicable to bastardy proceedings by s. 54).

(*b*) For the form, see note (*k*), p. 444, *ante*; and for the mode of execution, see title MAGISTRATES.

(*c*) The return day must not be more than seven days from the time of the recognisance (Bastardy Laws Amendment Act, 1872 (35 & 36 Vict. c. 65), s. 4).

(*d*) *I.e.*, within the jurisdiction of the justices (Bastardy Act, 1845 (8 & 9 Vict. c. 10), s. 8).

(*e*) The period of imprisonment in each case is regulated by the amount adjudged to be paid (Summary Jurisdiction Act, 1879 (42 & 43 Vict. c. 49), ss. 5, 54), which, it would seem, does not include the costs of enforcing the order (*ibid.*, ss. 47, 49).

(*f*) Bastardy Laws Amendment Act, 1872 (35 & 36 Vict. c. 65), s. 4. All arrears are discharged by the imprisonment (*Robson* v. *Spearman* (1820), 3 B. & Ald. 493, *per* ABBOTT, C.J., at p. 494).

(*g*) Army Act, 1881 (44 & 45 Vict. c. 58), s. 145 (1).

SECT. 6.—*Appeals.*

SECT. 6. Appeals.

SUB-SECT. 1.—*To Quarter Sessions.*

Appeal to quarter sessions by father only.

772. No appeal (*h*) is given to the mother against the refusal of an order by the justices (*i*); but the putative father may appeal to quarter sessions if an order is made against him (*j*). On the appeal the amount payable under the order for the maintenance and education of the child may be reduced (*k*). The time for appealing runs from the date of the making of the order in court, and not from the date when the order is formally drawn up (*l*).

Abandonment of proceedings.

The putative father may, at any time before the hearing, abandon his appeal by giving notice of abandonment in writing to the mother and to the justices before whom his recognisance was taken, and by paying to the mother all arrears due and her costs up to the time of abandonment (*m*). The mother may also before the hearing abandon her order on payment of costs to the appellant so as to replace him in his original position (*n*).

Evidence.

The court is to hear the evidence of the mother (*o*), and any other evidence produced by her, and any evidence tendered by the appellant, but cannot confirm the order unless the mother's evidence is corroborated in some material particular (*p*).

Costs.

If the unsuccessful party fail to pay the costs of an appeal, he or she may be imprisoned (*q*).

(*h*) For the case where the order is a nullity on the face of it, see p. 450, *ante*.

(*i*) *R.* v. *Machen* (1849), 14 Q. B. 74, *per* Lord DENMAN, at p. 79; but she may make a second application, see p. 445, *ante*.

(*j*) Poor Law Amendment Act, 1844 (7 & 8 Vict. c. 101), s. 4. There is no special mode of appealing in bastardy cases, and appeals are regulated by the Summary Jurisdiction Act, 1879 (42 & 43 Vict. c. 49), as made applicable to bastardy cases by the Summary Jurisdiction Act, 1884 (47 & 48 Vict. c. 43), s. 6 (*R.* v. *Shingler* (1886), 17 Q. B. D. 49); including the procedure as to recognisances (*R.* v. *West Riding Justices*, [1882] W. N. 34; *R.* v. *Anglesey Justices*, [1892] 2 Q. B. 29). The appeal does not operate as a stay of execution (*Kendall* v. *Wilkinson* (1855), 4 E. & B. 680). For the mode of appealing, see title MAGISTRATES.

(*k*) Bastardy Laws Amendment Act, 1872 (35 & 36 Vict. c. 65), s. 9.

(*l*) *Ex parte Johnson* (1863), 3 B. & S. 947.

(*m*) Bastardy Act, 1845 (8 & 9 Vict. c. 10), s. 5.

(*n*) *R.* v. *Hinchliff* (1847), 10 Q. B. 356. If part only of the order be invalid, the invalid part may be abandoned by the mother (*R.* v. *Fletcher* (1884), 48 J. P. 407, see note (*u*), p. 450, *ante*).

(*o*) It is not clear what the position is, if the mother die before the appeal. Her death before notice of appeal has been given does not prevent the appeal from being heard (*R.* v. *Leicestershire Justices* (1850), 15 Q. B. 88). But the wording of the section (Bastardy Act, 1845 (8 & 9 Vict. c. 10), s. 6) seems to point to the necessity of the mother giving evidence at the hearing before the order can be confirmed. The same words are used in the Bastardy Laws Amendment Act, 1872 (35 & 36 Vict. c. 65), s. 4, referring to the hearing at petty sessions, and in *R.* v. *Armitage* (1872), L. R. 7 Q. B. 773, it was held on the construction of that section that no order could be made unless the mother was heard (see p. 448, *ante*). It would therefore seem to follow that quarter sessions would have no alternative, in the absence of the mother, but to quash the order. The point was raised in *R.* v. *Armitage*, *supra*, but the court declined to decide it. It is probable, however, that the examination before the justices would be admissible. See *R.* v. *Leicestershire Justices* (1850), as reported in 4 New Sess. Cas. 124, *per* PATTESON, J., at p. 129; and *R.* v. *Ravenstone* (1793), 5 Term Rep. 373.

(*p*) Bastardy Act, 1845 (8 & 9 Vict. c. 10), s. 6.

(*q*) *R.* v. *Pratt* (1870), 39 L. J. (M. C.) 73.

SECT. 6. Appeals. *Certiorari.*

SUB-SECT. 2.—*Other Modes of Appeal.*

773. The putative father may also apply for a writ of *certiorari* to remove the order into the High Court (*r*). But there must be some legal defect apparent on the face of the order (*s*), or else it must be shown that the justices exceeded their jurisdiction in making the order (*t*). Proceedings by *certiorari* may be taken before or after an appeal to quarter sessions, but not whilst an appeal to quarter sessions is pending (*a*).

On the return to the writ mistakes or omissions in drawing up the order may be amended (*b*), but not mistakes in point of substance (*c*).

Special case.

774. After the hearing at petty sessions either party may apply to the justices to state a special case, on the ground that their decision is erroneous in point of law or is in excess of jurisdiction (*d*).

(*r*) For the procedure, see title CROWN PRACTICE.

(*s*) As in *R.* v. *Grafton* (1848), 17 L. J. (M. C.) 125.

(*t*) As in *R.* v. *Farmer*, [1892] 1 Q. B. 637; *R.* v. *Whittles* (1849), 13 Q. B. 248. If the justices refuse to hear a witness who remains in court after all witnesses have been ordered out, the proper remedy is an appeal to quarter sessions, not *certiorari* (*Ex parte Wright* (1875), 39 J. P. 85). But if the order were obtained through a breach of good faith, the remedy would be *certiorari* (*Ex parte Evans* (1872), 36 J. P. 759).

(*a*) *R.* v. *Sparrow* (1788), 2 Term Rep. 196, n.

(*b*) Quarter Sessions Act, 1849 (12 & 13 Vict. c. 45), s. 7. For an example, see *R.* v. *Higham* (1857), 7 E. & B. 557.

(*c*) *R.* v. *Tomlinson* (1872), L. R. 8 Q. B. 12.

(*d*) Summary Jurisdiction Act, 1879 (42 & 43 Vict. c. 49), s. 33. For an example, see *Bell* v. *Clubbs* (1892), 8 T. L. R. 298. See further title MAGISTRATES.

BATHS AND WASHHOUSES.

See PUBLIC HEALTH AND LOCAL ADMINISTRATION.

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BILLS OF EXCHANGE, PROMISSORY NOTES AND NEGOTIABLE INSTRUMENTS.

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Part I.—Introductory.

Origin of the law relating to bills etc.

775. The law relating to bills of exchange, bankers' cheques and promissory notes was in the year 1882 consolidated and reduced to the terms of a code (*a*). In its origin, however, it was, as the law relating to other negotiable instruments is now, a part of that branch of the common law known as the law merchant.

Law merchant.

The law merchant is sometimes spoken of as a fixed body of law forming part of the common law and coeval with the rest of it. But this view, as a matter of legal history, is altogether incorrect. The law merchant is neither more nor less than the usages of merchants and traders in the different departments of trade, ratified by the decisions of courts of law, which, upon such usages being proved before them, have adopted them as settled law with a view to the interest of trade and the public convenience. In thus acting the courts have proceeded on the well-known principle of law that with reference to transactions in the different departments of trade, courts of law, in giving effect to the contracts and dealings of the parties, will assume that the latter have dealt with one another on the footing of some custom or usage prevailing generally in that particular department. By this process what before was usage only, unsanctioned by legal decision, has become engrafted upon or incorporated with the common law (*b*).

Meaning of term "negotiable instrument."

776. On the important question what is meant by a negotiable instrument, it may be laid down as a safe rule that where an instrument is by the custom of trade transferable like cash by delivery, and is also capable of being sued upon by the person holding it *pro tempore*, then it is entitled to the name of a negotiable instrument (*c*).

The custom of trade in one country may differ from the custom of trade in another, and instruments negotiable in one country may

(*a*) Bills of Exchange Act, 1882 (45 & 46 Vict. c. 61).

(*b*) *Goodwin* v. *Robarts* (1875), L. R. 10 Exch. 337, *per* COCKBURN, C.J., at p. 346. Compare *Brandao* v. *Barnett* (1846), 12 Cl. & Fin. 787, *per* Lord CAMPBELL, at p. 805.

(*c*) *Crouch* v. *Credit Foncier of England* (1873), L. R. 8 Q. B. 374, *per* BLACKBURN, J., at p. 381, approving notes to *Miller* v. *Race* (1758), 1 Smith, L. C. 11th ed. 463, at p. 473.

PART I. Introductory.

therefore not be so in another. This, indeed, is the case with many such instruments as Government bills, debentures, bonds payable to bearer etc., which are only gradually and tentatively taking their places in the category of negotiable instruments. These will be dealt with hereafter (*d*); but bills of exchange and promissory notes have long held an acknowledged position in that category, so that the law respecting them may be truly declared to be in a great measure, not the law of a single country, but of the whole commercial world (*e*).

Some differences there are in different countries, even in the treatment of instruments universally acknowledged to be negotiable; but these are minor differences only, and, so far as this country is concerned, they are met by special provisions for the case of a conflict of laws (*f*).

Recognition of bills and notes as negotiable.

777. The earliest in time, as also the most important in character, of the instruments to be thus recognised was the bill of exchange. While bills are credited with a very ancient, if not mythical, origin, it is at least known that they were in use among the trading cities of the Mediterranean in the thirteenth or fourteenth century, and were brought thence probably by way of the Low Countries to England. Their introduction was followed at a short interval of time by that of promissory notes. Both were in use in this country in the seventeenth century (*g*), but while negotiability was an admitted attribute of a bill of exchange, it was denied to a promissory note by Lord Holt, C.J. (*h*). The difficulty thus created was, however, overcome by statute (*i*), and since then both bills of exchange and promissory notes have been continuously recognised by the courts as negotiable instruments.

Cheques.

Cheques are a special form of bills of exchange, comparatively modern in origin, which take the place of the notes formerly issued by bankers in return for the money of the customer deposited with them, and illustrate strikingly the adaptability of the law merchant. Inasmuch as they are universally recognised as coming within the category of negotiable instruments, they are dealt with by the codifying statute (*j*), which is thus a statement in convenient form of the rules of the law merchant recognised in the United Kingdom as applying to instruments universally acknowledged to be negotiable (*k*).

(*d*) See pp. 564 *et seq.*, *post*.

(*e*) *Luke* v. *Lyde* (1759), 2 Burr. 883, *per* Lord MANSFIELD, C.J., at p. 887, adopting the language of Cicero: "Non erit alia lex Romæ, alia Athenis, alia nunc, alia posthac; sed et apud omnes gentes et omni tempore una eademque lex obtinebit."

(*f*) See Bills of Exchange Act, 1882 (45 & 46 Vict. c. 61), s. 72; and see pp. 561 *et seq*, *post*.

(*g*) The first reported case on a bill of exchange is *Martin* v. *Boure* (1603), Cro. Jac. 6.

(*h*) *Buller* v. *Cripps* (1703), 6 Mod. Rep. 29.

(*i*) Stat. 3 & 4 Anne, c. 9; repealed by Bills of Exchange Act, 1882 (45 & 46 Vict. c. 61), s. 96, Sched. II.

(*j*) Bills of Exchange Act, 1882 (45 & 46 Vict. c. 61).

(*k*) These rules are the product of the decisions in some 2,500 cases, and, while the Act effected some minor alterations in the law, it represents the gist of the

Characteristics of bills etc.

778. The outstanding characteristics common to bills, cheques and notes which found expression in the cases decided before 1882, and are embodied in the codifying statute, are—(1) that in the case of such instruments a valuable consideration is presumed, so that there is no necessity to state it; (2) that such instruments may be transferred from one person to another by indorsement or by delivery, so as to enable the transferee to sue thereon in his own name; (3) that the transferee who takes such an instrument in good faith and for value obtains a good title in spite of any defect of title in the transferor (*l*).

Construction of Bills of Exchange Act, 1882.

The codifying statute is based upon these broad principles, and, even in its details, for the most part crystallises in permanent form the effect of the many judicial decisions which preceded it. But exceptions are to be found where the law has been deliberately altered by it. The true rule for its construction, therefore, is to examine its actual language, and to interpret that language in its most natural meaning without attempting to read into it the effect of particular decisions, rather than attempt to find in it the express image of those decisions themselves. To do the latter would indeed be to frustrate the very object of a code. But this view does not preclude the use of the previous decisions for illustrating or elucidating ambiguous or difficult provisions of the statute or for explaining the use of terms which have attained an historical significance in this branch of the law merchant (*m*).

Though the codifying statute has settled many disputed points, it has not set a bound to the questions that may be raised, even in regard to those negotiable instruments with which it specifically deals; and there have accordingly been a considerable number of important decisions since the year 1882, in which it was passed.

The effect of these cases may be to extend as well as to explain the terms of the statute, whereas the use of the earlier cases is merely to explain or to illustrate those terms.

To ascertain the present state of the law, therefore, it is necessary to collate the decisions in cases since the statute with the provisions of the statute itself and to estimate their combined effect. Such cases as are here cited that were anterior to the statute are of minor importance and to be regarded mainly in the light of examples of ascertained principles.

Adoption of the Act abroad.

779. The codifying of the law of bills of exchange, cheques, and promissory notes in England has had one great advantage, in that it has promoted the uniformity of the general law relating to such instruments, at least among the English-speaking nations. The Mercantile Law Amendment Act, 1856 (*n*), had already made the expression "inland bill or note" cover bills and notes drawn or made in Scotland and Ireland. The present statute re-enacts this

practice in this country during the past two hundred years. See Chalmers, Bills of Exchange, 6th ed. p. xlv.

(*l*) See note (*c*), p. 459, *ante*.

(*m*) See *Bank of England* v. *Vagliano Brothers*, [1891] A. C. 107, *per* Lord HERSCHELL, at p. 144.

(*n*) 19 & 20 Vict. c. 97, s. 7.

PART I. Introductory.

provision, but goes further in assimilating, except in a few particulars (*o*), which will be noticed in their proper place, the law of negotiable instruments in Scotland to that of England and Ireland. Moreover, the terms or phrases of the statute have been adopted, or at least adapted, by most of the British Colonies (*p*) and by many States of the United States of America.

Part II.—Bills of Exchange, Cheques, and Promissory Notes.

SECT. 1.—*Definitions.*

Bill of exchange.

780. A bill of exchange (*q*), sometimes called a draft or acceptance, is defined by statute to be an unconditional order in writing addressed by one person to another, signed by the person giving it, requiring the person to whom it is addressed to pay on demand or at a fixed or determinable future time a sum certain in money to or to the order of a specified person or to bearer (*r*).

Cheque.

A cheque is a bill of exchange drawn on a banker payable on demand (*s*).

Promissory note.

A promissory note is an unconditional promise in writing made by one person to another, signed by the maker, engaging to pay on demand or at a fixed or determinable future time a sum certain in money to or to the order of a specified person or to bearer (*t*).

An instrument which does not comply with one or other of these definitions is not a bill of exchange, cheque, or promissory note (*u*).

When an instrument is so ambiguous in form as to be capable of being treated either as a bill of exchange or a promissory note it is in the option of the holder to treat it as either (*w*).

(*o*) Especially in regard to funds in the hands of the drawee (Bills of Exchange Act, 1882 (45 & 46 Vict. c. 61), s. 53; see p. 515, *post*).

(*p*) The law of bills of exchange etc. was codified in India in 1881, *i.e.*, just before the English Act, but it was drafted on the same principles, and is designed to have the same effect.

(*q*) In the following pages the words "negotiable instrument" or "instrument" have been used wherever possible to cover the terms "bill of exchange," "banker's cheque," and "promissory note." Where they cannot be so used the particular form of instrument referred to is named.

(*r*) Bills of Exchange Act, 1882 (45 & 46 Vict. c. 61), s. 3 (1). Writing includes print (*ibid.*, s. 2), and person includes "body of persons" whether incorporated or not (*ibid.*).

(*s*) *Ibid.*, s. 73.

(*t*) *Ibid.*, s. 83 (1). The law which applies to bills of exchange applies generally to promissory notes, the maker of a note corresponding with the acceptor of a bill, and the first indorser of a note with the drawer of an accepted bill payable to drawer's order. But the provisions relating to presentment for acceptance, acceptance, acceptance *supra* protest, and bills in a set, naturally do not apply to notes (*ibid.*, s. 89).

(*u*) *Ibid.*, s. 3 (2). But it may be valid as another form of instrument, *e.g.*, as an assignment (*Buck* v. *Robson* (1878), 3 Q. B. D. 686; compare *Percival* v. *Dunn* (1885), 29 Ch. D. 128).

(*w*) *Edis* v. *Bury* (1827), 6 B. & C. 433; and see *Peto* v. *Reynolds* (1854), 9 Exch. 410; *Fielder* v. *Marshall* (1861), 9 C. B. (N. S.) 606.

SECT. 1. Definitions.

Drawer etc.

781. Drawer means the party who draws a bill of exchange or cheque.

Drawee means the party on whom such bill of exchange or cheque is drawn.

Acceptor (*a*) means the drawee of a bill of exchange, who has signified his assent to the order of the drawer.

Acceptance (*b*) means the signification of such assent completed by delivery or notification thereof.

Maker means the party who makes a promissory note.

Payee means the party to whom a bill of exchange, cheque, or note is made payable.

Delivery (*c*) means transfer of possession, actual or constructive, from one person to another.

Issue (*d*) means the first delivery of a bill of exchange, cheque, or note, complete in form, to a person who takes it as a holder.

Negotiation, etc.

782. Negotiation (*e*) means the transfer for value of a bill of exchange, cheque, or note to a person, who thereupon becomes entitled to hold it, and is capable of suing thereon in his own name.

Indorsement (*f*) means a transfer of a bill of exchange, cheque, or promissory note by writing the name of the party transferring it thereon and delivering it to the person to whom it is indorsed.

Indorser means a person who effects an indorsement.

Indorsee means the person to whom a bill of exchange, cheque, or promissory note is transferred by indorsement.

Bearer (*g*) means the person in possession of a bill or note which is payable to bearer.

Holder (*h*) means the payee or indorsee of a bill of exchange, cheque, or promissory note who is in possession of it, or the bearer thereof.

Holder for value (*i*) means, as regards all parties prior to himself, a holder of a bill of exchange cheque, or promissory note for which value has at any time been given.

(*a*) See p. 485, *post*. There is no acceptor of a cheque, see pp. 465, 516, *post*.

(*b*) Bills of Exchange Act, 1882 (45 & 46 Vict. c. 61), s. 2, p. 485, *post*. As to the meaning of an "approved acceptance," see *McDowall* v. *Snowball Co.* (1905), 7 F. (Ct. of Sess.) 35.

(*c*) Bills of Exchange Act, 1882 (45 & 46 Vict. c. 61), s. 2. Constructive transfer is involved in three cases: (1) where a man holding a bill on his own account subsequently holds it as agent for another; (2) where, having held it as agent for one, subsequently he holds it as agent for another; (3) where, having held it as agent for another, he subsequently holds it on his own account (Chalmers, Bills of Exchange, 6th ed. p. 4). See also *Belcher* v. *Campbell* (1845), 8 Q. B. 1; *Ancona* v. *Marks* (1862), 31 L. J. (EX.) 163.

(*d*) Bills of Exchange Act, 1882 (45 & 46 Vict. c. 61), s. 2.

(*e*) See pp. 479, 502, *post*. Compare *Crouch* v. *Credit Foncier of England* (1873), L. R. 8 Q. B. 374, *per* BLACKBURN, J., at p. 381, citing with approval the notes to *Miller* v. *Race* (1758), 1 Smith, L. C. 11th ed. 463, at p. 473.

(*f*) Bills of Exchange Act, 1882 (45 & 46 Vict. c. 61), s. 2, see p. 503, *post*; *Marston* v. *Allen* (1841), 8 M. & W. 494, *per* ALDERSON, B., at p. 504; *Denton* v. *Peters* (1870), L. R. 5 Q. B. 475.

(*g*) Bills of Exchange Act, 1882 (45 & 46 Vict. c. 61), s. 2.

(*h*) *Ibid.*, s. 2, p. 513, *post*. Compare *Lloyd's Bank, Ltd.* v. *Cooke*, [1907] 1 K. B. 794, *per* MOULTON, L.J., at p. 806; *Ex parte Hayward, Re Hayward* (1871), 6 Ch. App. 546, *per* JAMES, L.J., at p. 548; *Walters* v. *Neary* (1905), 21 T. L. R. 146.

(*i*) Bills of Exchange Act, 1882 (45 & 46 Vict. c. 61), s. 27 (2), (3), see p. 498, *post*.

SECT. 1. Definitions.

Holder in due course (*k*) means a holder of a bill of exchange, cheque, or promissory note, complete and regular on the face of it, who takes it in good faith and for value before it is overdue, and without notice either of its previous dishonour or of any defect in the title of the person who negotiated it to him.

SECT. 2.—*Necessary Parties.*

SUB-SECT. 1.—*Bills of Exchange.*

Necessary parties to a bill of exchange.

783. The necessary parties to a bill of exchange are: (1) the party giving the order, who must sign it, and who is called the drawer (*l*); (2) the party to whom the order is given, who is called the drawee (*m*), and who on assenting to the terms of the order and signing it is called the acceptor (*n*); and (3) the party to whom the money is to be paid, who is called the payee, or, if the bill be expressed "pay to bearer," the bearer.

The same person sometimes fills the position of two of these three necessary parties.

Thus the drawer may also be the payee when the bill is expressed "pay to us," "pay to our order," "pay to us or order," or "pay to order" (*o*).

The drawee may also be the payee, *e.g.*, where the bill is expressed "pay to your own order" (*p*). Here, though the instrument is in form a bill, there is nothing to enforce until the bill has been negotiated, *i.e.*, transferred for value by being indorsed by the drawee or payee to some other party.

Lastly, the drawer may also be the drawee. In this case, as also in the case of the drawee being a fictitious person (*q*) or a person not having capacity to contract (*r*), the holder may treat the instrument at his option either as a bill of exchange or a promissory note (*s*).

Referee in case of need.

784. Besides the parties necessary to a bill of exchange another party may be introduced at the option of the drawer, called "the referee in case of need" (*t*). The drawer in that event inserts on the face of the bill the name of a person to whom resort may be had "in case of need," *i.e.*, in the event of the bill being dishonoured

(*k*) Bills of Exchange Act, 1882 (45 & 46 Vict. c. 61), s. 29 (1) (a), (b), p. 514, *post*.

(*l*) As to the nature of the contract made by the drawer, see p. 518, *post*.

(*m*) Where the instrument, though in form a bill, is addressed to no drawee, it may be treated as a note, even where it cannot be treated as a bill (*Fielder* v. *Marshall* (1861), 9 C. B. (N. S.) 606).

(*n*) As to the nature of the contract made by the acceptor, see p. 515, *post*.

(*o*) Bills of Exchange Act, 1882 (45 & 46 Vict. c. 61), s. 5 (1). As to the last example, see *Chamberlain* v. *Young*, [1893] 2 Q. B. 206.

(*p*) Bills of Exchange Act, 1882 (45 & 46 Vict. c. 61), s. 5 (1). Formerly such an instrument was not a bill of exchange.

(*q*) See p. 474, *post*.

(*r*) See p. 489, *post*.

(*s*) Bills of Exchange Act, 1882 (45 & 46 Vict. c. 61), s. 5 (2); *Miller* v. *Thompson* (1841), 3 Man. & G. 576; *Allen* v. *Sea, Fire and Life Assurance Co.* (1850), 9 C. B. 574.

(*t*) Bills of Exchange Act, 1882 (45 & 46 Vict. c. 61), s. 15.

by non-acceptance or non-payment (*a*). The holder of the bill is at liberty to choose whether he will resort to him or not (*b*), but in the case of a bill, where it is desired to charge a drawer or indorser resident in a foreign country, the holder should ascertain whether the law of that country does not require him first to resort to the referee in case of need. A dishonoured bill must be protested, or at least noted for protest, for non-payment before it is presented for payment to the referee in case of need (*c*).

SUB-SECT. 2.—*Cheques.*

Necessary parties to cheques.

785. The necessary parties to a cheque are the same as those to a bill of exchange, save that the position of the drawee must be filled by a banker. The banker does not become "acceptor" of the cheque, but there is an implied contract between the banker and his customer that he will honour cheques drawn upon him by his customer up to the amount of the funds of his customer which he has in his hands, and where there is an agreement to let the customer overdraw, then up to the limits of the amount of the overdraft agreed on (*d*). With certain exceptions which will be noticed hereafter, the law applying to bills of exchange payable on demand applies equally to cheques (*e*).

Marked cheques.

Occasionally cheques are marked or certified by the bankers on whom they are drawn. Doing so does not convert the banker into an acceptor or make him liable on the instrument, but it does constitute a representation by him, on which he may be held liable, that the cheque will be paid as drawn if presented within a reasonable time. The effect on the cheque is to give it additional currency by showing on its face that it was drawn in good faith on funds sufficient to meet its payment and by adding to the credit of the drawer the credit of the banker on whom it is drawn (*f*).

SUB-SECT. 3.—*Promissory Notes.*

Necessary parties to promissory notes.

786. The necessary parties to a promissory note are: (1) the person who gives the promise, and who is called the maker (*g*); (2) the person to whom the note is given, and who is called the payee. Where the same person fills the position of both parties, *e.g.*, where the instrument is expressed "pay to my order," the

(*a*) This is a practice more common among the Continental nations than in England. The usual formulary is, "In case of need apply to Messrs. at ," or in French, "Au besoin chez Messrs. à " (Story, Bills of Exchange, 6th ed., s. 65); and see Encyclopædia of Forms, Vol. II., p. 511.

(*b*) Bills of Exchange Act, 1882 (45 & 46 Vict. c. 61), s. 15.

(*c*) *Ibid.*, ss. 67 (1), 93.

(*d*) See further, as to the position of the banker, p. 515, *post*. Also see title BANKERS AND BANKING, Vol. I., *passim*.

(*e*) Bills of Exchange Act, 1882 (45 & 46 Vict. c. 61), s. 73. See further pp. 480, 508, 515, 518, 531, 550, 557, *post*.

(*f*) *Imperial Bank of Canada* v. *Bank of Hamilton*, [1903] A. C. 49; *Gaden* v. *Newfoundland Savings Bank*, [1899] A. C. 281, 285. See also title BANKERS AND BANKING, Vol. I., pp. 606, 607.

(*g*) As to the nature of the contract made by the maker, see p. 519, *post*.

SECT. 2. Necessary Parties.

instrument is not a note unless and until it is indorsed by the maker (*h*).

SECT. 3.—*Requirements of Form.*

Wording immaterial.

787. It is not necessary to adhere to any form of words so long as the conditions of the definition are observed (*i*). The language in which the instrument is written is immaterial (*k*).

Date.

788. Omission of the date does not invalidate a bill or note (*l*). Where an instrument expressed to be payable at a fixed period after date is issued undated or where the acceptance of a bill payable at a fixed period after sight is undated, any holder may insert therein the true date of issue or acceptance, and the instrument becomes payable accordingly (*m*). Where the holder in good faith or by mistake inserts a wrong date, and in every case where a wrong date is inserted if the instrument subsequently comes into the hands of a holder in due course, the instrument is not invalidated, but the date so inserted is deemed to be the true one (*n*). The loss, if any, involved in the insertion of a wrong date is thus made to fall on the party whose negligence was responsible for it.

Where an instrument remains undated it would seem that it should be taken to be of the date when it was issued (*o*), *i.e.*, when it was first delivered complete in form to a person taking it as holder (*p*).

Where the drawing or indorsement of any instrument or the acceptance of any bill is dated, the date, unless the contrary be proved, is deemed to be the true date of the drawing, acceptance, or indorsement, as the case may be (*q*).

An instrument is not invalid by reason only that it is antedated or postdated or that it bears date on a Sunday (*r*).

(*h*) Bills of Exchange Act, 1882 (45 & 46 Vict. c. 61), s. 83 (2).

(*i*) A common form of inland bill of exchange is as follows:—

"£100 "London, January 1, 1907.

"Six months after date pay to John Smith or order the sum of one hundred pounds for value received.

"To Messrs. Brown & Co., London. "Thomas Jones."

For forms of bills of exchange, see Encyclopædia of Forms, Vol. II., pp. 510, 511; for forms of promissory notes, *ibid.*, pp. 513, 514; for forms of cheque, *ibid.*, pp. 515—517.

(*k*) *Re Marseilles Extension Railway and Land Co., Smallpage's and Brandon's Cases* (1885), 30 Ch. D. 598, where the fact of a bill being drawn in French did not prevent its being treated as an inland bill.

(*l*) Bills of Exchange Act, 1882 (45 & 46 Vict. c. 61), s. 3 (4) (a). Cheques are in a somewhat different position. Omission of the date may not, and probably does not, invalidate the cheque, but bankers usually refuse payment of an undated cheque, presumably on the ground that, unlike a bill or note, it is revocable in certain circumstances. See p. 516, *post*, and title BANKERS AND BANKING, Vol. I., p. 604.

(*m*) Bills of Exchange Act, 1882 (45 & 46 Vict. c. 61), s. 12.

(*n*) *Ibid.*

(*o*) *Ibid.*, s. 9 (3).

(*p*) *Ibid.*, s. 2. See also note (*m*), p. 481, *post*.

(*q*) *Ibid.*, s. 13 (1).

(*r*) *Ibid.*, s. 13 (2). As to postdated cheques, see *Royal Bank of Scotland* v. *Tottenham*, [1894] 2 Q. B. 715, and title BANKERS AND BANKING, Vol. I.,

789. Omission to specify the value given or that any value whatever was given for the instrument does not invalidate it (*a*), since the presumption always remains, unless actually negatived, that the instrument was given for a valuable consideration.

Value.

Evidence may be adduced to show absence, failure (*b*), or illegality of consideration or fraud (*c*), whether the instrument be expressed to be for value or not, and generally contemporary evidence in writing may be given to negative the presumption or statement, if any, of value given; but, subject as aforesaid, parol evidence the effect of which would be to vary the terms of the instrument as they appear upon its face is inadmissible (*d*).

Place.

790. It is usual, but not necessary (*e*), to state in a bill the place where it is drawn, or in a note the place where it is made.

It is unusual and unnecessary (*f*) to state the place where it is to be paid. The instrument may, however, be so expressed, and may be made payable alternatively in one of two places (*g*).

Sum payable.

791. A bill of exchange, cheque, or promissory note must be for the payment of money only; an instrument that orders any other action to be done in addition is not a bill of exchange, cheque, or promissory note (*h*). Further, it is essential that the money which is to be paid should be an exact sum (*i*), for otherwise the drawee could not tell what he is to pay or the payee or holder what he is entitled to demand. But there is no limit set to the amount for which a bill may be drawn (*k*).

p. 602. Where one in possession of a blank acceptance fills it up as a bill with himself as drawer, and antedates it by a whole year, the bill is good (*Armfield* v. *Allport* (1857), 27 L. J. (EX.) 42). Again, where a bill is dated at a time subsequent to that at which the payee who indorsed it actually died, it has been held that the postdating may be proved and the bill recovered on (*Pasmore* v. *North* (1811), 13 East, 517).

(*a*) Bills of Exchange Act, 1882 (45 & 46 Vict. c. 61), s. 3 (4) (b).

(*b*) See p. 497, *post*.

(*c*) See pp. 499 *et seq.*, *post*.

(*d*) *Ridout* v. *Bristow* (1830), 1 Cr. & J. 231; *Hill* v. *Wilson* (1873), 8 Ch. App. 888; *New London Credit Syndicate* v. *Neale*, [1898] 2 Q. B. 487. See p. 483, *post*, and generally title CONTRACTS.

(*e*) Bills of Exchange Act, 1882 (45 & 46 Vict. c. 61), s. 3 (4) (c).

(*f*) *Ibid.*

(*g*) *Beeching* v. *Gower* (1816), Holt (N. P.), 313; *Pollard* v. *Herries* (1803), 3 Bos. & P. 335, where a note was made payable in Paris or London at the choice of the holder, according to the rate of exchange.

(*h*) Bills of Exchange Act, 1882 (45 & 46 Vict. c. 61), s. 3 (2). Thus an instrument ordering the delivery up of houses and a wharf in addition to the payment of a sum of money is not a valid bill (*Martin* v. *Chauntry* (1747), Stra. 1271).

(*i*) Bills of Exchange Act, 1882 (45 & 46 Vict. c. 61), s. 3 (1). Therefore a note to pay a given sum and whatever else may be due to the payee is not a good note (*Smith* v. *Nightingale* (1818), 2 Stark. 375; *Crowfoot* v. *Gurney* (1832), 9 Bing. 372), nor a note to pay "£13 and all fines according to rule" (*Ayrey* v. *Fearnsides* (1838), 4 M. & W. 168), nor is a bill to pay the proceeds of the sale of a consignment of goods even when valued by the drawer at a definite sum a good bill (*Jones* v. *Simpson* (1823), 2 B. & C. 318).

(*k*) Bills of Exchange Act, 1882 (45 & 46 Vict. c. 61), s. 96 and Sched. II., repeals the statute 48 Geo. 3, c. 88, by which bills or notes for less than twenty

SECT. 3. Requirements of Form.

It is customary for bills and notes to have the amount written in figures at the top of the instrument and in words in the body of the instrument (*l*). Where there is a discrepancy between the two the sum denoted by the words is the amount payable (*m*), and evidence cannot be adduced to show that in fact there was a mistake made in omitting words in the body of the instrument (*n*).

Marginal figures.

The figures at the top (the marginal figures, as they are sometimes called) are not in fact a necessary part of an instrument, though they are commonly placed there. It would seem that their original purpose was that the amount of the instrument might strike the eye immediately and be a note, index, or summary of the contents (*o*).

But obvious and intelligible mistakes in the written words do not invalidate an instrument (*p*).

Interest.

The sum payable is not to be regarded as uncertain although it is required to be paid with interest (*q*). In considering the rate of interest when not expressed, regard must be had to the *lex loci contractus* (*r*).

In England there is no limit to the amount of interest that may be charged (*s*). But many foreign countries have usury laws, and bills or notes in such countries must not bear interest at a rate higher than that which the law permits. In England, where a bill or note is expressed to be with interest, but no rate is prescribed, it will be presumed to be at 5 per cent. An instrument payable with "lawful interest" is thus not invalid for uncertainty (*t*).

shillings were made void. In Scotland bills, notes, and all negotiable instruments (other than cheques on a banker for the payment of money held by such banker to the use of the drawer) for less than twenty shillings are void, and restrictions are placed on the drawing and negotiation of such instruments for sums between twenty shillings and £5 (Bank Notes (Scotland) Act, 1845 (8 & 9 Vict. c. 38), ss. 16—20). A penalty of £20 may be inflicted for infringing these provisions. A similar penalty may be inflicted on any person for uttering or negotiating bills, notes payable to bearer, or other instruments (other than cheques), for less than £5, which have been made in Scotland, Ireland, or elsewhere out of England (Bank Notes (No. 2) Act, 1828 (9 Geo. 4, c. 65), ss. 1, 4). There is also still in England a restriction on promissory notes for less than £5 payable to bearer on demand (Bank Notes Act, 1826 (7 Geo. 4, c. 6), s. 3). See further, as to bank notes generally, title BANKERS AND BANKING, Vol. I., p. 574.

(*l*) In a cheque the figures showing the amount are usually at the left-hand bottom corner.

(*m*) Bills of Exchange Act, 1882 (45 & 46 Vict. c. 61), s. 9 (2).

(*n*) *Saunderson* v. *Piper* (1839), 5 Bing. (N. C.) 425.

(*o*) *Garrard* v. *Lewis* (1882), 10 Q. B. D. 30, *per* BOWEN, L.J., at pp. 32—35, discussing at length the subject of marginal figures, and citing, at p. 33, Nouguier, Lettres de Change, edition 1875, p. 127: "Les chiffres ne sont pas que pour simple note."

(*p*) Thus where the body of a forged note had the words "Pay fifty" and the marginal figures were £50, it was held to be a forged note for the payment of money (*R.* v. *Elliot* (1777), 1 Leach, 175). So, too, a bill for "twenty-five, seventeen shillings and three-pence" has been held to be a good bill for £25 17*s.* 3*d.* (*Phipps* v. *Tanner* (1833), 5 C. & P. 488).

(*q*) Bills of Exchange Act, 1882 (45 & 46 Vict. c. 61), s. 9 (1) (a).

(*r*) See p. 561, *post*.

(*s*) Subject to the provisions of the Money-lenders Act, 1900 (63 & 64 Vict. c. 51), which in certain cases permit the reopening of money-lenders' transactions by the court. See title MONEY AND MONEY-LENDERS.

(*t*) *Warrington* v. *Early* (1853), 23 L. J. (Q. B.) 47, where it was held that a

SECT. 3. Requirements of Form.

The sum may also be expressed to be payable by stated instalments with or without a provision that upon default in payment of any instalment the whole shall become due (*u*), but the dates of the instalments must be determined (*a*).

Payment by instalments.

The sum may also be expressed to be payable according to an indicated rate of exchange or according to a rate of exchange to be ascertained as directed by the instrument (*b*). In an instrument drawn in one country and payable in another, the sum of money is usually expressed in terms of the currency in the country in which the instrument is drawn. To ascertain the amount payable in the other country, therefore, it is necessary to translate the sum expressed into terms of the currency of that country. Where the rate of exchange is not fixed by the terms of the instrument, it will be payable at the rate of exchange between the two countries on the day on which the instrument is payable (*c*).

Rate of exchange.

The addition to the instrument of a rate of exchange after acceptance is a material alteration which invalidates the instrument (*d*).

An instrument may be expressed to be payable in the alternative at one of two places in the choice of the holder according to the course of exchange between the two (*e*).

Peremptory order.

792. The wording of the instrument must import a demand, not a request. In theory (*f*), if not always in practice, the drawer of a bill is ordering the application to a specific purpose of funds which, though in the hands of the drawee, are nevertheless within the drawer's power of disposal; and this theory is necessary to the positive certainty of the instrument. The word "pay" itself need not, however, be used. "Credit" so-and-so, or any like term, may be equally effective.

note in these terms valid in itself was rendered invalid by a subsequent alteration. But see *contra*, *Lamberton* v. *Aiken* (1899), 2 F. (Ct. of Sess.) 189, where a note for a sum of money "together with any interest that may accrue thereon" was held invalid in Scotland on the ground of uncertainty.

(*u*) Bills of Exchange Act, 1882 (45 & 46 Vict. c. 61), s. 9 (1) (b), (c); *Carlon* v. *Kenealy* (1843), 12 M. & W. 139. Where a promissory note containing such a provision and a bill of sale are both given to secure the same debt, the bill of sale is invalidated by the stipulation in the note, but the note itself is good (*Monetary Advance Co.* v. *Cater* (1888), 20 Q. B. D. 785).

(*a*) *Moffat* v. *Edwards* (1841), Car. & M. 16, where the instrument was in this form: "I owe £6, which is to be paid by instalments for rent," and was held not to be a note.

(*b*) Bills of Exchange Act, 1882 (45 & 46 Vict. c. 61), s. 9 (1) (d).

(*c*) *Ibid.*, s. 72 (4). See also *Suse* v. *Pompe* (1860), 30 L. J. (C. P.) 75.

(*d*) *Hirschfeld* v. *Smith* (1866), L. R. 1 C. P. 340. See p. 556, *post*.

(*e*) *Pollard* v. *Herries* (1803), 3 Bos. & P. 353 See also note (*g*), p. 467, *ante*.

(*f*) Bills of Exchange Act, 1882 (45 & 46 Vict. c. 61), s. 3 (1). Thus an instrument in the form "Please to let bearer have £ , and you will oblige me," has been held not to be a valid bill (*Little* v. *Slackford* (1828), Mood. & M. 171); and compare *Russell* v. *Powell* (1845), 14 M. & W. 418; *Hamilton* v. *Spottiswoode* (1849), 4 Exch. 200. But see *Ruff* v. *Webb* (1794), 1 Esp. 129, *per* Lord KENYON, C.J., at p. 131, holding an instrument expressed thus: "Mr. Nelson will much oblige Mr. Webb by paying to J. Ruff or order 20 guineas on his account," to be a good bill.

SECT. 3. Requirements of Form.

Unconditional.

793. The order must be not only peremptory, but unconditional (*g*), for any condition made would at once import uncertainty. Thus a cheque drawn on a bank payable on the condition of signing a particular receipt form at the foot of the cheque may be conditional (*h*), if it is not clear that the words importing the condition are not addressed to the drawee. But the addition of the words "as per agreement" does not make a note conditional (*i*).

An order to pay out of a particular fund is not an unconditional order, and an instrument with such a provision is not therefore a good bill or note (*k*). But an indication of a particular fund out of which the drawee is to reimburse himself or of a particular account to be debited with the amount payable does not by itself prevent an order being unconditional (*l*), nor does the recital on the instrument of the transaction that gave rise to it (*m*). A note is not invalid by reason only that it contains also a pledge of collateral security, with authority to sell or dispose thereof (*n*).

(*g*) Bills of Exchange Act, 1882 (45 & 46 Vict. c. 61), s. 3 (1).

(*h*) *Bavins, Jun., and Sims* v. *London and South Western Bank*, [1900] 1 Q. B. 270. The instrument in this case was in the following form: "Pay to , provided that the receipt form at foot hereof is duly signed, stamped, and dated." Then follow signatures of the officers of the company drawing the instrument, and the receipt form was as follows: "Received from the Co. the above-named sum as per particulars furnished. This receipt is not to be detached from the cheque.

"Signature Dated 189 ."

See also, however, *Nathan* v. *Ogdens* (1905), 93 L. T. 553, affirmed on another point 22 T. L. R. 57, where the instrument had at the foot "The receipt at back hereof must be signed, which signature will be taken as an indorsement of this cheque," and on the back "Received from Mr. (liquidator of Ogdens, Limited) this cheque for , being my share of the second and final bonus distribution of the company." This was held by LAWRENCE, J., to be unconditional, "for though the words are imperative in terms, they are not addressed to the bankers, and do not affect the nature of the order to them." See title BANKERS AND BANKING, Vol. I., p. 599. For form of cheque with receipt attached, see Encyclopædia of Forms and Precedents, Vol. II., p. 517.

(*i*) *Jury* v. *Barker* (1858), E. B. & E. 459.

(*k*) Bills of Exchange Act, 1882 (45 & 46 Vict. c. 61), s. 3 (3). Thus an order to pay "out of the moneys now due or hereafter to become due to me under the will of my late father and before making any payment to me thereout" is not a valid bill (*Fisher* v. *Calvert* (1879), 27 W. R. 301), nor is the promise to pay out of the proceeds of a sale a valid note (*Hill* v. *Halford* (1801), 2 Bos. & P. 413). See also *Dawkes* v. *Earl of Deloraine* (1771), 2 Wm. Bl. 782; *Jenney* v. *Herle* (1723), 2 Ld. Raym. 1361; *Haydock* v. *Lynch* (1729), 2 Ld. Raym. 1563.

(*l*) Bills of Exchange Act, 1882 (45 & 46 Vict. c. 61), s. 3 (3). A note expressed "Pay £9 10*s*. as my quarterly half-pay" has been held a valid note (*Macleed* v. *Snee* (1727), 2 Stra. 762), and so, too, has a bill drawn on the official liquidator of a company to pay to £ "on account of moneys advanced by me to the company" (*Griffin* v. *Weatherby* (1868), L. R. 3 Q. B. 753). See also *Re Boyse, Canonge's Claim* (1886), 33 Ch. D. 612, where a bill for £ , "which sum is on account on the dividends and interest due on the capital and deeds registered in the books of the Governor and Company of the Bank of England in the name of and , which you will please charge to my account and credit according to a registered letter which I have addressed to you," was held good.

(*m*) Bills of Exchange Act, 1882 (45 & 46 Vict. c. 61), s. 3 (3). See *The Elmville*, [1904] P. 319.

(*n*) Bills of Exchange Act, 1882 (45 & 46 Vict. c. 61), s. 83 (3). See *Wise* v. *Charlton* (1836), 4 Ad. & El. 786.

SECT. 3. Requirements of Form.

794. A bill must be signed by the drawer (*o*), for though a bill may be accepted before it has the drawer's signature, it remains incomplete, and cannot be issued.

Signature of drawer.

But where a simple signature on a blank stamped paper is delivered by the signer in order that it may be converted into a bill, it may be made use of for the signature of the drawer up to any amount that the stamp will cover (*p*), provided that the instrument is filled up within a reasonable time (*q*) and strictly in accordance with the authority given (*r*).

The drawer or maker's signature is usually to be found at the foot of the instrument, but in the case of a note it may be sufficient if the maker's name is inserted in the body thereof (*s*).

A valid signature may be made in pencil (*t*), or in the case of an illiterate person by his mark (*a*).

Joint and several makers

795. A note may be made by two or more makers, and they may make it jointly or jointly and severally according to its tenor (*b*). But where there are two or more makers they cannot be liable severally and not jointly, nor can they be liable in the alternative (*c*). Where a note runs, "I promise to pay" etc., and is signed by two or more persons, it is deemed to be their joint and several note (*d*); but if it runs, "*We* promise to pay" etc., then it is their joint note only.

After a note is once issued the name of a new maker cannot be added without invalidating the note (*e*).

Certainty as to drawee.

796. Reasonable certainty is also required as to the drawee (*f*) of a bill, for it is clear that a holder must know to whom he has to present the bill, whether for acceptance or for payment.

A bill may be addressed to two or more drawees, whether they are partners or not (*g*), but an order addressed to two drawees in

(*o*) Bills of Exchange Act, 1882 (45 & 46 Vict. c. 61), s. 3 (1); *M'Call* v. *Taylor* (1865), 34 L. J. (C. P.) 365.

(*p*) Bills of Exchange Act, 1882 (45 & 46 Vict. c. 61), s. 20 (1). See further p. 483, *post*.

(*q*) *Ibid.*, s. 20 (2).

(*r*) *Ibid.*; *London and South Western Bank* v. *Wentworth* (1880), 5 Ex. D. 96; *Schultz* v. *Astley* (1836), 2 Bing. (N. C.) 544; *Awde* v. *Dixon* (1851), 6 Exch. 869.

(*s*) *Taylor* v. *Dobbins* (1720), 1 Stra. 399. But the intention to use the name as a signature must appear.

(*t*) *Geary* v. *Physic* (1826), 5 B. & C. 234.

(*a*) *George* v. *Surrey* (1830), Mood. & M. 516.

(*b*) Bills of Exchange Act, 1882 (45 & 46 Vict. c. 61), s. 85 (1). See *Ex parte Honey, Re Jefferey* (1871), 7 Ch. App. 178.

(*c*) *Ferris* v. *Bond* (1821), 4 B. & Ald. 679.

(*d*) Bills of Exchange Act, 1882 (45 & 46 Vict. c. 61), s. 85 (2); but where the makers are partners, and it is signed by one of them for the firm, see *Ex parte Buckley, Re Clarke* (1845), 14 M. & W. 469; and p. 492, *post*.

(*e*) *Gardner* v. *Walsh* (1855), 5 E. & B. 83.

(*f*) Bills of Exchange Act, 1882 (45 & 46 Vict. c. 61), s. 6 (1). This requisite is naturally complied with by naming the drawee precisely; but a bill expressed to be payable "at ," if accepted by the person who lives there, is a good bill (*Gray* v. *Milner* (1819), 8 Taunt. 739), and a bill addressed "at Messrs. " is a bill drawn on the firm of that name (*Shuttleworth* v. *Stephens* (1808), 1 Camp. 407).

(*g*) Bills of Exchange Act, 1882 (45 & 46 Vict. c. 61), s. 6 (2).

SECT. 3. Requirements of Form.

the alternative (*h*) or to two or more drawees in succession is not a bill of exchange, because, in the interests of the certainty of the instrument, there cannot be a series of acceptors (*i*).

SECT. 4.—*Classification of Instruments.*

SUB-SECT. 1.—*Bearer and Order Bills etc.*

Payable to bearer.

797. An instrument may be made payable (1) to bearer, or (2) to a specified person or to his order (*k*).

An instrument is payable to bearer which is simply so expressed, or which is expressed thus: "Pay to or bearer," or which, having been made payable to a specified payee or his order, has been indorsed in blank (*l*).

Payable to order.

An instrument is payable to order which is payable to the order of a specified person, or which is payable to a specified person or his order, or which is payable to a specified person, and does not contain words prohibiting transfer or indicating an intention that it should not be transferable (*m*).

Where an instrument is made payable to the order of a specified person, and not to him or his order, it is payable to him or his order at his option (*n*).

Where an instrument is not payable to bearer, the payee must be named or otherwise indicated with reasonable certainty (*o*), for in no other way can the drawee of a bill, if he accepts it, know to whom he may properly pay it, so as to discharge himself from all future liability (*p*).

Where payee's name omitted.

798. Where the payee's name is not filled in, it is open to any holder for value to write his own name in (*q*) and sue on the instrument; but if his right to do so is contested, he must be prepared to prove that he was not acting outside the scope of his authority (*r*). In the hands of any subsequent holder in due course the instrument is valid or effectual for all purposes (*s*).

(*h*) An apparent exception to this is the "referee in case of need," but his functions are distinct from those of the drawee. See p. 464, *ante*. In the case of a note, too, the parties who draw the note may be both jointly and severally liable on it.

(*i*) *Jackson* v. *Hudson* (1810), 2 Camp. 447, *per* Lord ELLENBOROUGH, C.J., at p. 448. See also *Re Barnard* (1886), 32 Ch. D. 447.

(*k*) Bills of Exchange Act, 1882 (45 & 46 Vict. c. 61), s. 3 (1).

(*l*) *Ibid.*, s. 8 (3).

(*m*) *Ibid.*, s. 8 (4).

(*n*) *Ibid.*, s. 8 (5). So, too, when a bill is made payable "to us or order," and the acceptor alters the bill by striking out the words "or order" and inserts over his acceptance the words "in favour of drawer only," the character of the instrument is not altered, for the drawer may indorse the bill to another party as if no alteration had been made (*Meyer & Co.* v. *Decroix*, [1891] A. C. 520).

(*o*) Bills of Exchange Act, 1882 (45 & 46 Vict. c. 61), s. 7 (1).

(*p*) Story, Bills of Exchange, 6th ed. s. 54.

(*q*) Bills of Exchange Act, 1882 (45 & 46 Vict. c. 61), s. 20 (1); *Crutchley* v. *Clarance* (1813), 2 M. & S. 90; and see *Atwood* v. *Griffin* (1826), 2 C. & P. 368; *Chamberlain* v. *Young*, [1893] 2 Q. B. 206, *per* BOWEN, L.J., at p. 210.

(*r*) Bills of Exchange Act, 1882 (45 & 46 Vict. c. 61), s. 20 (2). See *Crutchley* v. *Mann* (1813), 1 Marsh. 29; *Crutchley* v. *Mann* (1814), 5 Taunt. 529, and p. 484, *post*.

(*s*) Bills of Exchange Act, 1882 (45 & 46 Vict. c. 61), s. 20 (2).

When a bill is in the form, "Pay to order," and is indorsed in that form by the drawer, the bill is equivalent to one drawn, "Pay to my order," and is a good bill (*t*). Where a bill is in the form, "Pay to or order," and is accepted or indorsed while in that state, the effect is doubtful (*u*).

Payee named incorrectly.

799. Where the payee is named, but named incorrectly, or where his name is misspelt, it does not invalidate the instrument, the payee being permitted to indorse the instrument as he was described, adding at his option his proper signature (*w*).

It is sufficient that the payee should be indicated without being actually named if the indication is reasonably precise (*x*).

Where there are two persons of the same name who are possible payees, the presumption will be that the one indorsing the instrument was the person intended (*a*).

Two payees.

An instrument may be made payable to two or more payees jointly, or it may be made payable in the alternative to one of two or one or some of several payees (*b*).

Holder of an office.

An instrument may also be made payable to the holder of an office for the time being (*c*).

(*t*) *Chamberlain* v. *Young*, [1893] 2 Q. B. 206.

(*u*) *Ibid.*, *per* BOWEN, L.J., at p. 210. Where the drawer drew a bill, "Pay to or order," and it was accepted by the drawee and indorsed by the drawer without the payee's name being filled in, there would be "an estoppel of some sort, but whether it would go to the length of estopping the acceptor and the indorser respectively from saying that the document was ["not" omitted, as appears from the contemporaneous reports and from the context] a bill of exchange at the time when it was issued, or whether it would only prevent them from denying that it was issued with an authority from them to fill up the blank, and preclude them after the blank had been filled up from denying that what was merely an inchoate bill, until the blank had been filled up, had matured into a bill immediately the blank was filled up, is, I think, a matter of some nicety. An authority to fill up the blank is certainly conferred on the holder of such an inchoate bill by the form in which it is issued, and that authority would not be determined by the death of the acceptor, but would continue afterwards. There would, therefore, be some contract with the holder, which must, I think, be referred to the law of estoppel, and it may be that the estoppel merely prevents the drawer or acceptor from denying that, when the blank has been filled up, the document will become from that time forward a bill of exchange to all intents and purposes." Lord ESHER, M.R. in the same case, without deciding the point, said (p. 209): "The proposition" (*i.e.*, that the drawer could claim that such a bill indorsed by himself is invalid) "appears to me to be contrary to the most ordinary morality of mercantile transactions." And see *Wookey* v. *Pole* (1820), 4 B. & Ald. 1; *contra*, *R.* v. *Randall* (1811), Russ. & Ry. 195.

(*w*) Bills of Exchange Act, 1882 (45 & 46 Vict. c. 61), s. 32 (4). See *Willis* v. *Barrett* (1816), 2 Stark. 29.

(*x*) *Storm* v. *Stirling* (1854), 3 E. & B. 832; *Cowie* v. *Stirling* (1856), 6 E. & B. 333. Compare *Soares* v. *Glyn* (1845), 8 Q. B. 24.

(*a*) *Stebbing* v. *Spicer* (1849), 19 L. J. (C. P.) 24. But, this apart, it has been held that where father and son had the same name the payee will be presumed to be the father (*Sweeting* v. *Fowler* (1815), 1 Stark. 106).

(*b*) Bills of Exchange Act, 1882 (45 & 46 Vict. c. 61), s. 7 (2). Both these provisions altered the law from its pre-existing state. It had been held that a note addressed in the alternative was invalid (*Blanckenhagen* v. *Blundell* (1819), 2 B. & Ald. 417).

(*c*) Bills of Exchange Act, 1882 (45 & 46 Vict. c. 61), s. 7 (2). It had also been held that a bill addressed to the "treasurer for the time being" of a society or a note addressed to "the secretary for the time being" of a company was

SECT. 4. Classification of Instruments.

Fictitious person.

800. Where an instrument is made payable to a fictitious or non-existing person, it may be treated as payable to bearer (*d*).

The words "fictitious or non-existing person" have given occasion for much difference of opinion. Even now the meaning of "non-existing" is not clear, but it would appear to mean a person who does not exist at the time the instrument is drawn, whether he ever existed previously or not (*e*).

The meaning of "fictitious" has been elucidated by a series of cases, the effect of which is to decide that (*f*) whenever the name inserted as that of the payee is so inserted by way of pretence merely, without any intention that payment shall only be made in conformity therewith, the payee is a fictitious person within the meaning of the statute, whether the name be that of an existing person or of one who has no existence (*g*).

The meaning here placed upon "fictitious" may be illustrated by the analogy of the phrases "a fictitious indorsement" or "a fictitious entry," by which it is clearly intended to imply not that the indorsement or entry did not exist, but that they were brought into existence entirely for the purpose of deception (*h*).

But where an instrument is made payable to a person known by the drawer to be an existing person and intended by the drawer to be the payee, such a person is not to be deemed fictitious, even although the signature of the drawer has been obtained by fraud (*i*).

invalid (*Yates* v. *Nash* (1860), 29 L. J. (C. P.) 306; *Cowie* v. *Stirling* (1856), 6 E. & B. 333). But a note addressed to "the trustees of or their treasurer for the time being" was held good in *Holmes* v. *Jaques* (1866), L. R. 1 Q. B. 376.

(*d*) Bills of Exchange Act, 1882 (45 & 46 Vict. c. 61), s. 7 (3). Before the Act was passed a bill drawn to the order of a fictitious payee could have been treated as a bill payable to bearer only as against a party who knew that the payee was fictitious.

(*e*) Where a firm has been induced by one of its employees by means of fraudulent vouchers to sign cheques payable to one who was in fact a non-existing person, and the employee has cashed them for his own benefit, the firm cannot recover the value of the cheques from the banker who cashed them (*Clutton* v. *Attenborough*, [1897] A. C. 90). *Quære*, however, whether the result would have been the same if the payee had been "fictitious" instead of non-existing (*ibid.*, *per* Lord HALSBURY, L.C., at pp. 93, 94, commented on in *Vinden* v. *Hughes*, [1905] 1 K. B. 795, *per* WARRINGTON, J., at p. 800). And see *Aspitel* v. *Bryan* (1864), 33 L. J. (Q. B.) 328.

(*f*) *Bank of England* v. *Vagliano Brothers*, [1891] A. C. 107. In this case one Glyka, the clerk of Messrs. Vagliano Brothers, had perpetrated a series of frauds by inducing his employers to accept bills which he had drawn himself, and in which he had fraudulently inserted as the drawers and payees the names of different firms with which his employers were accustomed to transact business. He then forged the indorsements of the payees, and obtained cash for himself from bankers. Compare *Clutton* v. *Attenborough*, *supra*.

(*g*) *Bank of England* v. *Vagliano Brothers*, *supra*, *per* Lord HERSCHELL, at p. 153.

(*h*) *Ibid.*, *per* Lord HERSCHELL, at pp. 152, 153; and see *Stone* v. *Freeland* (1769), 1 Hy. Bl. 316, n.

(*i*) *Vinden* v. *Hughes*, [1905] 1 K. B. 795, where a clerk in the employ of plaintiffs, who were market salesmen, being in the habit of writing out cheques for plaintiffs to sign payable to persons with whom they did business, obtained the signatures of plaintiffs to a series of cheques payable to such persons, and, forging the indorsements, obtained cash from the defendant, a friend, who took them honestly and paid them through his bank. Nevertheless the plaintiffs were held entitled to recover. See also *North and South Wales Bank* v. *Macbeth*, (1908) 24 T. L. R. 397, where the facts were similar.

SUB-SECT. 2.—*Inland and Foreign Bills.*

SECT. 4. Classification of Instruments.

801. A bill of exchange may be either an inland or a foreign bill. An inland bill is a bill which is, or upon the face of it purports to be, (a) both drawn and payable within the British Islands (*k*), or (b) drawn within the British Islands upon some person resident therein. Any other bill is a foreign bill (*l*). But unless the contrary appears on the face of the bill, the holder may treat it as an inland bill (*m*). Inland and foreign bills.

A note which is, or on the face of it purports to be, both made and payable within the British Islands, is an inland note. Any other note is a foreign note (*n*). Inland and foreign notes.

SUB-SECT. 3.—*Sight and Time Bills etc.*

802. Bills and notes are payable either on demand or at a fixed or determinable future time (*o*). Cheques are always payable on demand (*p*). Instruments payable on demand.

Bills and notes are payable on demand—(1) when they are expressed to be payable on demand or at sight or on presentation; (2) when no time for payment is expressed (*q*). Such a bill or note may be presented for payment at any time in the option of the holder, but it must be within a reasonable time after its issue in order to render the drawer liable and within a reasonable time (*r*) after its indorsement to render the indorser liable (*s*).

An instrument payable on demand is deemed to be overdue when it appears on the face of it to have been in circulation for an unreasonable length of time (*t*). Overdue.

An instrument payable otherwise than on demand which has been accepted or indorsed when overdue is deemed as regards the acceptor or indorser concerned to be an instrument payable on demand (*a*).

Instruments payable on demand are not subject to "days of grace" (*b*).

(*k*) "British Islands" means any part of the United Kingdom of Great Britain and Ireland, the islands of Man, Guernsey, Jersey, Alderney, and Sark, and the islands adjacent to any of them being part of the dominions of His Majesty (Bills of Exchange Act, 1882 (45 & 46 Vict. c. 61), s. 4 (1).

(*l*) *Ibid.* In the case of foreign bills it is evident that the laws of foreign countries must be considered, but the case of conflict between British and foreign laws has been provided for by the statute (*ibid.*, s. 72). See p. 561, *post.*

(*m*) Bills of Exchange Act, 1882 (45 & 46 Vict. c. 61), s. 4 (2).

(*n*) *Ibid.*, s. 83 (4). As to what is meant by the term "British Islands," see note (*k*), *supra.*

(*o*) *Ibid.*, s. 3 (1).

(*p*) *Ibid.*, s. 73.

(*q*) *Ibid.*, s. 10 (1).

(*r*) What is a reasonable time is to be determined by having regard to the nature of the instrument, the usage of trade with regard to similar instruments, and the facts of the particular case (*ibid.*, s. 45 (2)). See p. 531, *post.*

(*s*) *Ibid.*, s. 45 (2). Cheques should also be presented within a reasonable time, but as to this, see p. 531, *post*, and title BANKERS AND BANKING, Vol. I., p. 603.

(*t*) A question of fact in each case (Bills of Exchange Act, 1882 (45 & 46 Vict. c. 61), s. 36 (3)).

(*a*) *Ibid.*, s. 10 (2).

(*b*) *Ibid.*, s. 14. Before 1871 bills payable at sight or on presentation were permitted three days' grace. For days of grace, see p. 477, *post.*

SECT. 4. Classification of Instruments.

803. An instrument is payable at a determinable future time which is expressed to be payable—(1) at a fixed period after date (*c*) or sight; (2) on or at a fixed period after the occurrence of a specified event which is certain to happen, though the time of happening may be uncertain (*d*).

Time bills.

It cannot be made payable simply after date or after sight, for that would involve uncertainty.

It is usual to make instruments payable at so many months or days after date or sight; and when the term "month" is used it means a calendar month (*e*).

Usance.

Formerly, at any rate, it was not uncommon, especially in the case of foreign bills, to find the expression "at usance" or at "double," "treble," or "half usance" (*f*).

Fixed period after sight.

804. Where a bill is payable at a fixed period after sight the time is to be calculated from the date of the acceptance if the bill be accepted, and from the date of noting or protest if the bill is noted or protested for non-acceptance or non-delivery (*g*).

In the case of a note the phrase "after sight" means after exhibition thereof to the maker for the purpose of founding a claim for payment (*h*).

In the case of a bill payable after sight which has been accepted for honour, the date of its maturity is calculated from the date of the noting for non-acceptance, and not from the date of the acceptance for honour (*i*).

Events from which time may be reckoned.

805. The specified event on or at a fixed period after the occurrence of which the instrument is to be payable may be at any distance of time so long as it is an event that cannot fail to occur (*k*).

The instrument may also be made payable at or at a fixed period after "any feast, civil or religious," or at any "fixed holiday" (*l*), or

(*c*) As to the case of an instrument expressed to be payable at a fixed period after date, but issued undated, see p. 466, *ante*.

(*d*) Bills of Exchange Act, 1882 (45 & 46 Vict. c. 61), s. 11.

(*e*) *Ibid.*, s. 14 (4).

(*f*) See Story, Bills of Exchange, 6th ed. ss. 50, 51. Usance means the period fixed for the payment of bills by the custom of trade between the place where the bill is drawn and that where it is payable. Usances vary in different places, and in each case the existence or nature of the particular usance must be proved.

(*g*) Bills of Exchange Act, 1882 (45 & 46 Vict. c. 61), s. 14 (3); *Campbell* v. *French* (1795), 6 Term Rep. 300.

(*h*) *Holmes* v. *Kerrison* (1810), 2 Taunt. 333; *Sturdy* v. *Henderson* (1821), 4 B. & Ald. 592; *Dixon* v. *Nuttall* (1834), 6 C. & P. 320. A note is not accepted, and thus differs from a bill of exchange. See p. 526, *post*.

(*i*) Bills of Exchange Act, 1882 (45 & 46 Vict. c. 61), s. 65 (5); *Williams* v. *Germaine* (1827), 7 B. & C. 468.

(*k*) Bills of Exchange Act, 1882 (45 & 46 Vict. c. 61), s. 11 (2). Thus a note made payable six weeks after the death of the father of the maker is a good note (*Colehan* v. *Cooke* (1743), Willes, 393). And so, too, is one made payable to one then an infant on his coming of age (*Goss* v. *Nelson* (1757), 1 Burr. 226), and one payable one year after notice (*Clayton* v. *Gosling* (1826), 5 B. & C. 360) or a month after demand in writing (*Price* v. *Taylor* (1860), 5 H. & N. 540).

(*l*) Story, Bills of Exchange, 6th ed. s. 50.

at a fair, even if the precise date of the fair be not fixed at the time the instrument is drawn (*m*).

The specified event may also be one of a public nature (*n*), which for that very reason is held certain to take place.

But the instrument must not be expressed to be payable on a contingency (*o*), and even if the event contemplated actually occurs (*p*) the instrument remains invalid.

Calculation of time of payment.

806. Where an instrument is payable at a fixed period after date, after sight, or after the happening of a specified event, the time of payment is determined by excluding the day from which the time is to begin to run and by including the day of payment (*q*).

Days of grace.

In the case of every such instrument, unless otherwise ordered by the instrument itself (*r*), three days, called days of grace, are added to the time of payment as fixed by the instrument, and the instrument is due and payable on the last day of grace (*s*).

When the last day of grace falls on Sunday (*t*), Christmas Day, Good Friday, or a day appointed by royal proclamation as a public fast or thanksgiving day, the instrument is due and payable on the preceding business day (*a*). When the last day of grace is a bank holiday (other than Christmas Day or Good Friday) under the Bank Holidays Act, 1871, and Acts amending or extending it, or when the last day of grace is a Sunday and the second day of grace is a bank holiday, the instrument is due and payable on the succeeding business day (*b*).

These very complicated provisions apply to this country only. The allowance or non-allowance of days of grace is to be governed

(*m*) See *Colehan* v. *Cooke* (1743), Willes, at p. 399.

(*n*) As on the paying off of a ship of His Majesty's navy (*Andrews* v. *Franklin* (1717), 1 Stra. 24; *Evans* v. *Underwood* (1749), 1 Wils. 262), or on the receipt of prize money (*R.* v. *M'Intosh* (1800), 2 East, P. C. 942, 956). But the arrival of a ship at its destination is only a contingency (*Palmer* v. *Pratt* (1824), 2 Bing. 185).

(*o*) Bills of Exchange Act, 1882 (45 & 46 Vict. c. 61), s. 11. Thus a note payable at days after the marriage of the maker is not valid (*Beardesley* v. *Baldwin* (1741), 2 Stra. 1151; *Pearson* v. *Garrett* (1693), 4 Mod. Rep. 242), nor is one to pay on the death of a third party "provided he leaves either of us sufficient to pay the said sum, or if we shall be otherwise able to pay it" (*Roberts* v. *Peake* (1757), 1 Burr. 323; see *Leeds* v. *Lancashire* (1809), 2 Camp. 205); nor is one to pay ninety days after sight or when realised (*Alexander* v. *Thomas* (1851), 16 Q. B. 333).

(*p*) Bills of Exchange Act, 1882 (45 & 46 Vict. c. 61), s. 11; *Hill* v. *Halford* (1801), 2 Bos. & P. 413.

(*q*) Bills of Exchange Act, 1882 (45 & 46 Vict. c. 61), s. 14 (2). See *Campbell* v. *French* (1795), 6 Term Rep. 300.

(*r*) As where a bill is expressed to be payable "without grace."

(*s*) Bills of Exchange Act, 1882 (45 & 46 Vict. c. 61), s. 14 (1). This applies to each instalment of a note payable by instalments (*Oridge* v. *Sherborne* (1843), 11 M. & W. 374). Days of grace, which were probably in their origin "voluntary and discretionary on the part of the holder" (Story, Bills of Exchange, 6th ed. s. 333), became gradually established by custom in most countries, but at no time was the custom uniform in regard to the number of days allowed, and at the present time in most foreign countries (*e.g.*, France, Germany, and the other States of Western Europe, and some of the States of the United States of America) the custom has been abolished altogether.

(*t*) Note the modification introduced by the next rule.

(*a*) Bills of Exchange Act, 1882 (45 & 46 Vict. c. 61), s. 14 (1) (a).

(*b*) *Ibid.*, s. 14 (1) (b).

SECT. 4. Classification of Instruments.

altogether by the law of the place where the instrument is payable (*c*).

The complication introduced by the distinction between common law and statutory bank holidays, with their varying rules as to the day on which instruments must be presented, is yet further enhanced by differences as to what are holidays in the various parts of the United Kingdom (*d*).

Effect of days of grace.

807. An instrument must not be presented for payment until the third day of grace. Any earlier presentment is invalid (*e*). If it is presented on the third day, and payment is refused, the instrument is dishonoured, and the holder is entitled to give notice of dishonour, but no right of action accrues to the holder until the following day, for the acceptor may, in spite of refusal in the first instance, make a valid payment at any time in the course of the day, and if he does so the notice of dishonour becomes void (*f*).

Meaning of the term "month."

808. As the term "month" means a calendar month, an instrument drawn or made on the thirty-first of any month succeeded by a month with fewer days and payable one month after date is nominally payable on the last day of the succeeding month, so that, *e.g.*, bills payable one month after date and drawn on January 29, 30, and 31 are all nominally payable on February 28, or, in the case of Leap Year, February 29. The ordinary days of grace must be added to get the real date of payment.

Old style.

A further consideration arises in the case of instruments either drawn in or payable in a country which adheres to the old style. Where the instrument is drawn payable at a certain period after date, it is payable on the identical day (called differently because of the different notation of time) on which it would have been payable in the country in which it was drawn. In general Russian instruments payable after date in Western countries bear date according to both styles, and the date at which they are payable is calculated according to the new style (*g*).

(*c*) Story, Bills of Exchange, 6th ed. s. 333.

(*d*) In England Christmas Day and Good Friday are common law holidays, and Easter Monday, Whit Monday, first Monday in August, and December 26 (or if the last is a Sunday, then December 27) are bank holidays; and in Ireland the same days are bank holidays, with the addition of March 17 (or if a Sunday, then March 18). In Scotland Christmas Day, New Year's Day (if these days fall on a Sunday, then December 26 and January 2), Good Friday, first Monday in May, and first Monday in August are bank holidays (Bank Holidays Act, 1871 (34 & 35 Vict. c. 17), and the Holidays Extension Act, 1875 (38 & 39 Vict. c. 13)). In particular a difference arises owing to the fact that Christmas Day is a common law holiday in England and a bank holiday in Scotland, for by the operation of the Bills of Exchange Act, 1882 (45 & 46 Vict. c. 61), s. 14 (1) (b), whenever Christmas Day falls on a Saturday, instruments due on the immediately succeeding Sunday are payable in England on the preceding business day, but in Scotland on the succeeding business day. See title TIME.

(*e*) *Wiffen* v. *Roberts* (1795), 1 Esp. 261, 262. As to unavoidable delay in presentation for payment, see p. 533, *post*.

(*f*) *Kennedy* v. *Thomas*, [1894] 2 Q. B. 759; and see also *Cocks* v. *Masterman* (1829), 9 B. & C. 902. As to dishonour, see p. 535, *post*.

(*g*) See Chalmers, Bills of Exchange, 6th ed. p. 247.

SECT. 5.—*Negotiability.*

SECT. 5. Negotiability.

809. Bills of exchange or promissory notes are always *primâ facie* negotiable (*h*). They may, however, contain words prohibiting transfer or indicating an intention that they should not be transferable (*i*), and in such case they are only valid as between the parties thereto (*k*).

Restriction on negotiability.

An instrument may also contain an express stipulation on the part of the drawer or maker or any indorser either (1) negativing or limiting his own liability to the holder, or (2) waiving as regards himself some or all of the holder's duties (*l*).

Stipulations by parties.

Thus any party may sign the instrument adding words such as "sans recours" or "without recourse to me" (*m*), or words such as "Notice of dishonour waived."

810. The method of negotiating bills and notes is (1) where they are payable to bearer, simply by delivery; (2) where they are payable to order, by indorsement and delivery (*n*).

Mode of negotiation.

The specified payee of an instrument payable to order negotiates it either by indorsing it in blank (*o*), or by directing payment to another specified party and signing his name beneath the direction, which is written on the back of the instrument. He thus becomes an indorser of the instrument, and the party to whom he directs payment to be made becomes the indorsee.

Indorsement.

The indorsee may in his turn direct payment to another and become an indorser.

811. Where an indorsee has given value for the instrument he is deemed to be a holder for value as regards the acceptor and all parties to the instrument who became parties prior to him (*a*).

Holder for value.

He is said to be a holder in due course if he has taken an instrument, which is complete and regular on the face of it, under the conditions following: (1) that he became the holder of it before it was overdue and without notice that it had been previously dishonoured, if such was the fact; (2) that he took the instrument in good faith or for value, and that at the time the instrument was negotiated to him he had no notice of any defect in the title of the person who negotiated it (*b*).

(*h*) For cheques, see p. 480, *post*, and title BANKERS AND BANKING, Vol. I., pp. 590—597, 602—612, 615—619.

(*i*) See *National Bank* v. *Silke*, [1891] 1 Q. B. 435, where the mention of a particular account to be credited or debited was held not to be such an indication.

(*k*) Bills of Exchange Act, 1882 (45 & 46 Vict. c. 61), s. 8 (1).

(*l*) *Ibid.*, s. 16.

(*m*) *Goupy* v. *Harden* (1816), 7 Taunt. 159, *per* DALLAS, J., at p. 163. Compare *Castrique* v. *Buttigieg* (1855), 10 Moo. P. C. C. 94. A note containing the following stipulation: "No time given to, or security taken from, or composition or arrangement entered into with, either party hereto, shall prejudice the right of the holder to proceed against any other party," is not invalid (*Kirkwood* v. *Carroll*, [1903] 1 K. B. 531, overruling *Kirkwood* v. *Smith*, [1896] 1 Q. B. 582, and approving *Yates* v. *Evans* (1892), 61 L. J. (Q. B.) 446).

(*n*) Bills of Exchange Act, 1882 (45 & 46 Vict. c. 61), s. 31.

(*o*) See p. 505, *post*.

(*a*) Bills of Exchange Act, 1882 (45 & 46 Vict. c. 61), s. 27 (2)

(*b*) *Ibid.*, s. 29 (1).

SECT. 5. Negotiability.

It is open to any indorsee as being the payee named in the indorsement, just as it was to the original payee, to indorse an instrument payable to order in blank and so make it payable to bearer (*c*), or to require payment to himself (*d*). He may also curtail the further negotiability of the instrument (*e*), or convert an indorsement in blank into an indorsement to or to the order of himself or some other person (*f*).

Crossing of cheques.

812. The above rules for the negotiation of bills and notes apply generally to cheques, with this addition, that the negotiation of a cheque may be affected by "crossing" it. This is done by drawing two parallel transverse lines across the face of the cheque. If the lines are drawn simply, or if the words "and company" or any abbreviation thereof are written within them, with or without the addition in either case of the words "not negotiable," the cheque is said to be crossed generally; and in that case a holder who desires to receive payment of the cheque must present it through a banker (*g*).

Not negotiable.

If within the transverse lines there is written the name of a banker, with or without the words "not negotiable," the cheque is said to be crossed specially, and to the banker named; and in that case a holder who desires to receive payment of the cheque must present it through that banker (*h*).

Who may cross.

The drawer of a cheque may, if he wishes, cross it either generally or specially (*i*).

The holder may, (1) if the cheque is uncrossed, cross it either generally or specially; (2) if the cheque is crossed generally, add the name of a banker so as to convert the general crossing into a special one; (3) in either case add the words "not negotiable" (*j*).

A banker (1) to whom a cheque is crossed specially may cross it specially to another banker for collection; (2) to whom a cheque that is uncrossed or crossed generally is sent for collection may cross it specially to himself (*k*).

SECT. 6.—*Delivery.*

SUB-SECT. 1.—*In General.*

Delivery essential.

813. Delivery (*l*) is an incident of the utmost importance in the life of a bill, cheque, or note. It is essential to the issue of an

(*c*) Bills of Exchange Act, 1882 (45 & 46 Vict. c. 61), s. 8 (3). See also s. 34 (1).
(*d*) *Ibid.*, s. 8 (5).
(*e*) *Ibid.*, s. 35. See also s. 36.
(*f*) *Ibid.*, s. 34 (4).
(*g*) *Ibid.*, s. 76 (1). For forms of crossings, see Encyclopædia of Forms. Vol. II., pp. 515, 516.
(*h*) *Ibid.*, s. 76 (2).
(*i*) *Ibid.*, s. 77 (1).
(*j*) *Ibid.*, s. 77 (2), (3), (4). The holder includes the payee (*ibid.*, s. 2; and see *Lloyd's Bank, Ltd.* v. *Cooke*, [1907] 1 K. B. 794, *per* MOULTON, L.J., at p. 807).
(*k*) Bills of Exchange Act, 1882 (45 & 46 Vict. c. 61), s. 77 (5), (6). As to the duties and rights of bankers in regard to crossed cheques, see *ibid.*, ss. 79, 80, 82; Bills of Exchange (Crossed Cheques) Act, 1906 (6 Edw. 7, c. 17); *Capital and Counties Bank* v. *Gordon*, [1903] A. C. 240; and title BANKERS AND BANKING, Vol. I., pp. 593—597, 610—612.
(*l*) For definition of "delivery," see p. 463, *ante*.

instrument, for by issue is meant the first delivery of the instrument complete in form to a person who takes it as holder (*m*). It is equally essential to the negotiation of an instrument, for it is plain that an instrument payable to bearer must be transferred by that means, and in the case of any other instrument indorsement is incomplete without it (*n*). In fact, every contract on an instrument, whether it be the drawer's, the maker's, the acceptor's, or an indorser's, is incomplete and revocable until delivery is made in order to give effect thereto (*o*).

What amounts to delivery.

But where an acceptance is written on a bill, and the drawee gives notice to or according to the direction of the person entitled to the bill that he has accepted it, that is deemed to be tantamount to delivery, and the acceptor's contract becomes thereupon complete and irrevocable (*p*). Where the drawee has accepted a bill, but given no intimation of acceptance to the drawer, he is entitled to revoke his act (*q*), and this is so even where a bill has been deposited with the drawee for acceptance, and the holder on calling for the bill is told that the bill has been mislaid and is requested to call again on the following day (*r*).

So, too, a note is incomplete and revocable until delivery to the payee (*s*), and such a note cannot be issued to the payee by an executor after the maker's decease (*t*).

Mode of delivery.

814. Delivery may be made by post, but where it is so made it is made at the risk of the sender (*u*), unless the intended recipient has in some way authorised such means of delivery. When a bill has

(*m*) For the definition of "issue," see Bills of Exchange Act, 1882 (45 & 46 Vict. c. 61), s. 2, and p. 463, *ante*. A holder includes payee, indorsee in possession, and bearer (*ibid.*, s. 2, p. 463, *ante*; *Ex parte Hayward*, *Re Hayward* (1871), 6 Ch. App. 546, *per* JAMES, L.J., at p. 548).

(*n*) For the definition of "indorsement," see Bills of Exchange Act, 1882 (45 & 46 Vict. c. 61), s. 2, and p. 463, *ante*; *Marston* v. *Allen* (1841), 8 M. & W. 494; *Abrey* v. *Crux* (1869), L. R. 5 C. P. 37, *per* BOVILL, C.J., at p. 42; and see note (*o*), *infra*.

(*o*) Bills of Exchange Act, 1882 (45 & 46 Vict. c. 61), s. 21 (1). Compare *Ex parte Cote*, *Re Deveze* (1873), 9 Ch. App. 27, *per* MELLISH, L.J., at p. 31: "In order to make the property in the bills pass, it is not sufficient to indorse them; they must be delivered to the indorsee or to the agent of the indorsee. If the indorser delivers them to his own agent, he can recover them; if to the agent of the indorsee, he cannot recover them." See also *Cox* v. *Troy* (1822), 5 B. & Ald. 474; *Brind* v. *Hampshire* (1836), 1 M. & W. 365; *Bank of Van Diemen's Land* v. *Bank of Victoria* (1871), L. R. 3 P. C. 526.

(*p*) Bills of Exchange Act, 1882 (45 & 46 Vict. c. 61), s. 21 (1), proviso.

(*q*) *Cox* v. *Troy*, *supra*.

(*r*) *Bank of Van Diemen's Land* v. *Bank of Victoria*, *supra*.

(*s*) *Chapman* v. *Cottrell* (1865), 34 L. J. (EX.) 186.

(*t*) *Bromage* v. *Lloyd* (1847), 1 Exch. 32. Where, however, a note is made, and directions are left by the maker that it shall be delivered to the payee after his death, it may perhaps constitute a charge on the maker's estate (*Re Richards* (1887), 36 Ch. D. 541). But see *Re Whitaker* (1889), 42 Ch. D. 119, *per* COTTON, L.J., at p. 125, dissenting from *Re Richards*, *supra*, in so far, if at all, as it lays down the proposition that the payee of a promissory note without any consideration might in equity have a claim by way of debt.

(*u*) *Pennington* v. *Crossley* (1897), 13 T. L. R. 513. See *Warwicke* v. *Noakes* (1791), 1 Peake, 98.

SECT. 6. Delivery.

once been posted, delivery is in English law irrevocable (*w*), for a letter, once sent, cannot be reclaimed, but until actually intrusted to the post-office authorities the property remains in the sender, so that where a letter containing a bill is closed and placed in the letter-box of an office, but stolen therefrom before being posted, the theft is from the sender (*a*).

Part delivery.

Part delivery does not complete the contract, so that when a note is cut in half, and the sender, having forwarded one half, decides not to send the other, he cannot be compelled to do so (*b*).

Delivery by or to agent.

815. As between the immediate parties, and as regards a remote party other than a holder in due course, the delivery, if not made by the party drawing, accepting, or indorsing, as the case may be, must at least be made under his authority in order to be effectual (*c*).

Delivery made to an agent may afterwards be ratified by the principal even after an action has been brought in the principal's name (*d*).

Revocation of delivery by mistake.

When delivery has been made by mistake, and it is desired to revoke it, this may be done by consent (*e*).

SUB-SECT. 2.—*Conditional Delivery.*

Conditional delivery.

816. Delivery may be shown to have been conditional or for a special purpose only, not for the purpose of transferring the property in the bill (*f*). But if a bill be in the hands of a holder in due course a valid delivery of the bill by all parties prior to him so as to make them liable to him is conclusively presumed (*g*). And in every case where a bill is no longer in the possession of a party who has signed it as drawer, acceptor, or indorser, a valid and unconditional delivery by him is presumed until the contrary is proved (*h*).

Although a conditional delivery is valid, the condition attaches exclusively to the delivery. It does not affect the rule that a bill must be drawn (*i*), and a note made, unconditionally (*k*).

(*w*) *Ex parte Cote, Re Deveze* (1873), 9 Ch. App. 27. It is otherwise, however, in a country (*e.g.*, France) where the letter can be reclaimed from the postal authorities (*ibid.*).

(*a*) *Arnold* v. *Cheque Bank* (1876), 1 C. P. D. 578.

(*b*) *Smith* v. *Mundy* (1860), 29 L. J. (Q. B.) 172.

(*c*) Bills of Exchange Act, 1882 (45 & 46 Vict. c. 61), s. 21 (2) (a).

(*d*) *Ancona* v. *Marks* (1862), 31 L. J. (EX.) 163, where the instrument sued on was delivered by one Wright to a firm of solicitors with directions that they should hold it for the plaintiff and sue in his name, and the plaintiff was held entitled to ratify after action brought.

(*e*) *Ex parte Cote, Re Deveze, supra.*

(*f*) Bills of Exchange Act, 1882 (45 & 46 Vict. c. 61), s. 21 (2) (b); *Bell* v. *Lord Ingestre* (1848), 12 Q. B. 317. If the person to whom the instrument is so conditionally delivered misappropriates it, the true owner can recover it from him or a party taking it from him with notice (*Goggerley* v. *Cuthbert* (1806), 2 Bos. & P. (N. R.) 170; *Arnold* v. *Cheque Bank* (1876), 1 C. P. D. 578; *North and South Wales Bank* v. *Macbeth* (1908), 24 T. L. R. 397).

(*g*) Bills of Exchange Act, 1882 (45 & 46 Vict. c. 61), s. 21 (2). See p. 514, *post.*

(*h*) *Ibid.*, s. 21 (3).

(*i*) *Colehan* v. *Cooke* (1743), Willes, 393.

(*k*) As to conditional indorsement, see p. 505, *post.*

Evidence.

817. Evidence in writing that is contemporaneous (*l*) or even subsequent (*m*) to the date of the instrument may be adduced, and may control the effect thereof. Oral evidence may not be adduced to vary the terms of the instrument (*n*), but may be adduced to deny the existence of consideration (*o*) or to show that an apparently complete contract is not so in fact (*p*).

As between the parties there may be an agreement to renew the instrument (*q*), but evidence of a parol agreement to such effect is not admissible, though such evidence may be admitted to show that the instrument was only delivered as an escrow, or that it is not to take effect as a contract until some condition is fulfilled (*r*).

Difference from escrow.

818. The delivery of a bill conditionally or for a special purpose is akin to the delivery of a deed in escrow, but there is this difference, that the deed must be delivered to a party outside the contract (*s*), whereas the negotiable instrument may be delivered to one of the parties thereto (*t*). When it is so delivered the relation *inter se* of the parties is that of principal and agent.

SUB-SECT. 3.—*Blank Signatures and Incomplete Instruments.*

Blank signature.

819. The delivery by the signer of a simple signature upon a blank stamped paper in order that the paper may be converted into a bill or note operates as a *primâ facie* authority to fill the paper up as a complete instrument for any amount that the stamp will cover, using the signature for that of the drawer, acceptor, maker, or indorser (*a*).

(*l*) *Maillard* v. *Page* (1870), L. R. 5 Exch. 312.

(*m*) *McManus* v. *Bark* (1870), L. R. 5 Exch. 65; *Liquidators of Overend, Gurney & Co.* v. *Liquidators of Oriental Financial Corporation* (1874), L. R. 7 H. L. 348.

(*n*) *Foster* v. *Jolly* (1835), 1 Cr. M. & R. 703; *Abbott* v. *Hendricks* (1840), 1 Man. & G. 791; *Besant* v. *Cross* (1851), 10 C. B. 895; *Woodbridge* v. *Spooner* (1819), 3 B. & Ald. 233; *Stott* v. *Fairlamb* (1883), 53 L. J. (Q. B.) 47, *per* BOWEN, L.J., at p. 50; *New London Credit Syndicate* v. *Neale*, [1898] 2 Q. B. 487.

(*o*) *Abbott* v. *Hendricks*, *supra*.

(*p*) *Lindley* v. *Lacey* (1864), 34 L. J. (C. P.) 7; *New London Credit Syndicate* v. *Neale*, *supra*. See further, titles EVIDENCE; CONTRACT.

(*q*) *Maillard* v. *Page*, *supra*; *Salmon* v. *Webb* (1852), 3 H. L. Cas. 510. This is *primâ facie* for one renewal only (*Innes* v. *Munro* (1847), 1 Exch. 473). The application for renewal must be made within reasonable time, but not necessarily before maturity. See p. 553, *post*.

(*r*) *New London Credit Syndicate* v. *Neale*, *supra*, *per* SMITH, L.J., at p. 490.

(*s*) *Bell* v. *Lord Ingestre* (1848), 12 Q. B. 317. As to escrows, see title DEEDS AND DOCUMENTS.

(*t*) Compare *Davis* v. *Jones* (1856), 17 C. B. 625.

(*a*) Bills of Exchange Act, 1882 (45 & 46 Vict. c. 61), ss. 20 (1), 89. See *Montague* v. *Perkins* (1853), 22 L. J. (C. P.) 187. As to the amount covered by the stamp, see *Swan* v. *North British Australasian Co.* (1863), 2 H. & C. 175, 184. For instances of the use of the signature, see *Collis* v. *Emett* (1790), 1 Hy. Bl. 312 (drawer); *Montague* v. *Perkins*, *supra*; *Schultz* v. *Astley* (1836), 2 Bing. (N. C.) 544; *London and South Western Bank* v. *Wentworth* (1880), 5 Ex. D. 96 (acceptor); *Lloyd's Bank, Ltd.* v. *Cooke*, [1907] 1 K. B. 794 (maker); *Foster* v. *Mackinnon* (1869), L. R. 4 C. P. 704, 712 (indorser). A blank acceptance may be converted into a complete instrument after the death of the acceptor (*Carter* v. *White* (1883), 25 Ch. D. 666; *Re Duffy* (1880), 5 L. R. Ir. 92), and this is the case even where the party to whom the blank acceptance was

SECT. 6. **Delivery.**

Incomplete instrument.

So, too, where a person is in possession of an instrument wanting in any material particular, he has *primâ facie* authority to fill up the omission in any way he thinks fit (*b*). But, in order that any such instrument when completed may be enforceable against any person who became a party thereto prior to its completion, it must be filled up within a reasonable time (*c*), and strictly in accordance with the authority given (*d*).

Effect of negotiation after completion.

Where, however, any such instrument after completion is negotiated to a holder in due course (*e*), it is valid and effectual for all purposes in his hands, and he may enforce it as if it had been filled up within a reasonable time and strictly in accordance with the authority given (*f*).

delivered also dies, if his administrator inserts his own name as drawer. Where, however, a blank acceptance is given by one party to another, and that other party returns it, the first party cannot be sued if the blank acceptance is subsequently stolen and issued as a complete instrument by an unauthorised person (*Baxendale* v. *Bennett* (1878), 3 Q. B. D. 525). So, too, where an incomplete promissory note signed abroad on unstamped paper was handed to an agent for safe custody until directed to fill it up, and the agent fraudulently filled it up and negotiated it to a *bonâ fide* holder for value, it was held that the maker was not estopped from setting up the fraud (*Smith* v. *Prosser*, [1907] 2 K. B. 735; compare *Herdman* v. *Wheeler*, [1902] 1 K. B. 361). See note (*f*), p. 519, *post*.

Such a blank acceptance, although not a bill or note or security for the payment of money, or a writing the value of which exceeds £10 within the Carriers Acts (*Stoessiger* v. *South Eastern Rail. Co.* (1854), 3 E. & B. 549; see title CARRIERS), is perhaps a security capable of conversion within the terms of s. 75 of the Larceny Act, 1861 (24 & 25 Vict. c. 96) (*R.* v. *Bowerman*, [1891] 1 Q. B. 112). And see title CRIMINAL LAW AND PROCEDURE.

Where a person signs a blank acceptance intending to guarantee it, and delivers it to another, who fills it up as a bill payable to drawer's order, and then signs as drawer and indorser, the first indorser is liable in spite of the position of the names on the bill (*Glenie* v. *Bruce Smith*, [1907] 2 K. B. 507, affirmed, [1908] 1 K. B. 263).

(*b*) Bills of Exchange Act, 1882 (45 & 46 Vict. c. 61), s. 20 (1). As to filling in the amount, see *Montague* v. *Perkins* (1853), 22 L. J. (C. P.) 187; *Garrard* v. *Lewis* (1882), 10 Q. B. D. 30. As to filling in date, see Act of 1882, s. 12, and p. 466, *ante*.

(*c*) Bills of Exchange Act, 1882 (45 & 46 Vict. c. 61), s. 20 (2). The question as to what is reasonable time is a question of fact in each case (*ibid.*). See *Temple* v. *Pullen* (1853), 22 L. J. (EX.) 151. Where a party gives a blank acceptance and then becomes bankrupt, but the bill is not filled up or negotiated before his discharge, the holder can recover from him as acceptor (*Goldsmid* v. *Hampton* (1858), 5 C. B. (N. S.) 94). See title BANKRUPTCY AND INSOLVENCY, *ante*.

(*d*) Bills of Exchange Act, 1882 (45 & 46 Vict. c. 61), s. 20 (2); *Watkin* v. *Lamb* (1901), 83 L. T. 483. See *Awde* v. *Dixon* (1851), 6 Exch. 869.

(*e*) *Quære*, whether a delivery to the payee is a negotiation to a holder in due course so as to enable him to enforce the instrument as filled up (*Lloyd's Bank, Ltd.* v. *Cooke*, [1907] 1 K. B. 794, *per* FLETCHER MOULTON, L.J., at p. 808: *contra*, *Herdman* v. *Wheeler*, *supra*; *Lewis* v. *Clay* (1897), 67 L. J. (Q. B.) 224, *per* Lord RUSSELL OF KILLOWEN, C.J., at p. 227). Where, however, the instrument has been signed and delivered to a third person for the purpose of enabling him to obtain an advance from the payee, the payee is entitled to enforce it on the ground of estoppel (*Lloyd's Bank, Ltd.* v. *Cooke*, *supra*, distinguishing *Herdman* v. *Wheeler*, *supra*). See note (*f*), p. 519, *post*.

(*f*) Bills of Exchange Act, 1882 (45 & 46 Vict. c. 61), s. 20 (2), proviso; *Schultz* v. *Astley* (1836), 2 Bing. (N. C.) 544; *London and South Western Bank* v. *Wentworth* (1880), 5 Ex. D. 96. A holder in due course must *ex hypothesi* have taken the instrument when complete and regular on the face of it. If the holder without inquiry takes a blank acceptance and fills up the blanks himself, he cannot claim to be a holder in due course or to have a better title than his transferor (*Hatch* v. *Searles* (1854), 2 Sm. & G. 147; *France* v. *Clark*

SECT. 7.—*Acceptance.*

SECT. 7. Acceptance.

SUB-SECT. 1.—*By whom it may be made.*

Acceptance.

820. The acceptance of a bill is the signification by the drawee of his assent to the order of the drawer (*g*). Thereafter the drawee is called the acceptor. But the drawee, in the absence of any special agreement, is under no obligation to accept a bill (*h*).

What constitutes acceptance.

821. The signature of any person other than the drawee or his agent, though purporting to be an acceptance, is not one in fact (*i*).

Firm.

But a man trading in a name other than his own may accept in either name (*k*). When a bill is addressed personally to one who is also a partner in a firm, and he accepts it in the name of the firm, it is nevertheless not the firm's acceptance, but his own (*l*). So, too, when a bill is addressed to a firm, and a partner accepts the bill in the name of the firm, adding his own name, the acceptance is that of the firm, not of the partner (*m*). A bill addressed to a firm, and accepted by one member of the firm in his own name is an acceptance by that member of the firm, and not by the firm itself (*n*). An acceptance in its true style by a firm wrongly addressed is a valid acceptance (*o*).

Married woman.

A bill addressed to a married woman as "Mrs. John Smith" would be properly accepted by her in the style "Emma Smith, wife of John Smith."

Agents.

822. Where a bill is accepted by an agent (*p*) of the drawee, instead of by the drawee himself, the acceptance is good. The hand that holds the pen is immaterial if in fact there be authority to

(1884), 26 Ch. D. 257). Where a person, without authority to do so, gives a blank acceptance in his firm's name to another who transfers it to a third person for value, the third person cannot complete the instrument and recover from the firm to which the giver of the blank acceptance belongs, if he knew that such giver gave it without authority (*Hogarth* v. *Latham & Co.* (1878), 3 Q. B. D. 643). When a person is induced by a false representation as to the nature of the instrument to give his signature on a bill or note, he is not liable on it if he acted without negligence (*Foster* v. *Mackinnon* (1869), L. R. 4 C. P. 704, as to which case see also *Howatson* v. *Webb*, [1908] 1 Ch. 1; *Lewis* v. *Clay* (1897), 67 L. J. (Q. B.) 224; *Bagot* v. *Chapman*, [1907] 2 Ch. 222.

As regards the cognate question where a negotiable instrument is so filled up as to enable it to be altered to a larger amount, see pp. 555 *et seq*, *post*, as to effect of alterations as a discharge.

(*g*) Bills of Exchange Act, 1882 (45 & 46 Vict. c. 61), s. 17 (1).

(*h*) *Rowe* v. *Young* (1820), 2 Bli. 391, 402. As to cheques, see p. 515, *post*, and note especially the provisions in regard to Scotland in Bills of Exchange Act, 1882 (45 & 46 Vict. c. 61), s. 53 (2), *ibid.*

(*i*) *Jackson* v. *Hudson* (1810), 2 Camp. 447; *Davis* v. *Clarke* (1844), 6 Q. B. 16; and compare *Steele* v. *M'Kinlay* (1880), 5 App. Cas. 754, *per* Lord BLACKBURN, at p. 770. As to a referee in case of need, see p. 464, *ante;* as to an acceptor for honour, see p. 539, *post.*

(*k*) Bills of Exchange Act, 1882 (45 & 46 Vict. c. 61), s. 23.

(*l*) *Nicholls* v. *Diamond* (1853), 9 Exch. 154.

(*m*) *Re Barnard* (1886), 32 Ch. D. 447.

(*n*) *Owen* v. *Van Uster* (1850), 10 C. B. 318. Where a firm was being wound up, and a bill addressed to the firm was accepted by the liquidator in his own name and the name of a member of the firm, the latter was held not to have accepted the bill (*Odell* v. *Cormack* (1887), 19 Q. B. D. 223).

(*o*) *Lloyd* v. *Ashby* (1831), 2 B. & Ad. 23.

(*p*) Bills of Exchange Act, 1882 (45 & 46 Vict. c. 61), s. 91. See also p 494, *post*, and title AGENCY, Vol. I., p. 208.

SECT. 7. Acceptance.

sign (*q*). Where a bill is addressed to an agent, and the agent accepts, the principal is not bound, even though the agent had authority to accept bills (*r*).

SUB-SECT. 2.—*Time of Acceptance.*

Time of acceptance.

823. A bill may be accepted before it has been signed by the drawer or while otherwise incomplete (*s*).

It may also be accepted when it is overdue or after it has been dishonoured by a previous refusal to accept or by non-payment (*t*); but if so, it is deemed as regards the acceptor to be payable on demand (*a*).

If a bill payable after sight is dishonoured by non-acceptance, and the drawee afterwards accepts it, the holder is entitled, in the absence of any agreement to the contrary, to have the bill accepted as of the date of the first presentment for acceptance (*b*).

Dating of acceptance.

824. In general an acceptance need not, though it may, be dated; but if the bill is payable after sight, the date of acceptance should always be inserted. If in such a case a date is not inserted, the holder is entitled to insert it himself (*c*).

Where the date of the acceptance is not inserted, the presumption will be made that it was before maturity of the bill and within a reasonable time of its issue (*d*).

SUB-SECT. 3.—*Form of Acceptance.*

Form of acceptance.

825. The acceptance must be written (*e*) on the bill and be signed by the drawee (*f*). It is not complete until delivery or notification (*g*).

(*q*) Bills of Exchange Act, 1882 (45 & 46 Vict. c. 61), ss. 25, 26. But the fact of agency must be proved if necessary. (*Lindus* v. *Bradwell* (1848), 5 C. B. 583, in which case a bill was addressed to the husband, and an acceptance was written by the wife in her own name; as the husband was held to have authorised this, he was held liable; *sed quære* how?). See also *Jenkins* v. *Morris* (1847), 16 M. & W. 877; *Okell* v. *Charles* 1876), 34 L. T. 822. A signature *per pro.* operates as a notice that the agent has only a limited authority to sign, and the principal is only bound by such signature if the agent was acting within the actual limits of his authority (Bills of Exchange Act, 1882 (45 & 46 Vict. c. 61), s. 25; *Attwood* v. *Munnings* (1827), 7 B. & C. 278).

(*r*) Compare *Polhill* v. *Walter* (1832), 3 B. & Ad. 114; *Steele* v. *M'Kinlay* (1880), 5 App. Cas. 754.

(*s*) Bills of Exchange Act, 1882 (45 & 46 Vict. c. 61), s. 18 (1). And see p. 483, *ante*.

(*t*) *Ibid.*, s. 18 (2); *Mutford* v. *Walcot* (1700), 1 Ld. Raym. 574; *Wynne* v. *Raikes* (1804), 5 East, 514.

(*a*) Bills of Exchange Act, 1882 (45 & 46 Vict. c. 61), s. 10 (2). See p. 475, *ante*.

(*b*) *Ibid.*, s. 18 (3); *Roberts* v. *Bethell* (1852), 12 C. B. 778.

(*c*) Bills of Exchange Act, 1882 (45 & 46 Vict. c. 61), ss. 12, 13. See p. 466, *ante*.

(*d*) See *Roberts* v. *Bethell*, *supra*, where the drawee accepted without dating a bill payable three months after date, and came of age just before its maturity, in which case it was presumed that he accepted it while still a minor.

(*e*) Bills of Exchange Act, 1882 (45 & 46 Vict. c. 61), s. 17 (2). A verbal acceptance was valid at common law until the Mercantile Law Amendment Act, 1856 (19 & 20 Vict. c. 97), s. 6. See *Bank of Ireland* v. *Archer* (1843), 11 M. & W. 383.

(*f*) Bills of Exchange Act, 1882 (45 & 46 Vict. c. 61), s. 17 (2).

(*g*) *Ibid.*, s. 2. See p. 481, *ante*; *Cox* v. *Troy* (1822), 5 B. & Ald. 474; *Bank of Van Diemen's Land* v. *Bank of Victoria* (1871), L. R. 3 P. C. 526.

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826. Any appropriate words may be made use of by the drawee to convey his assent to the drawer's order, but his bare signature, without additional words, is sufficient (*h*).

An acceptance is usually written across the face of the bill, but it may be anywhere on the face and perhaps even on the back (*i*).

An acceptance must in no case state that the drawee will fulfil his obligation otherwise than by payment of money (*k*).

SUB-SECT. 4.—*Nature of Acceptance.*

General and qualified acceptances.

827. An acceptance may be either general or qualified (*l*). A general acceptance assents without qualification to the order of the drawer (*m*). A qualified acceptance in express terms varies the effect of the bill as drawn (*n*).

Qualification must be clear.

If the acceptor desires to qualify his acceptance, he must do so in definite terms on the face of the bill, so that anyone taking the bill may clearly understand that it was accepted subject to an express qualification (*o*). In the absence of such an express qualification, the acceptance will be deemed absolute (*p*).

Holder and qualified acceptance.

828. The holder of a bill may refuse to take a qualified acceptance, and if he does not obtain an unqualified one may treat the bill as dishonoured by non-acceptance (*q*).

(*h*) Bills of Exchange Act, 1882 (45 & 46 Vict. c. 61), s. 17 (2) (a). It was once held that the bare signature was insufficient (*Hindhaugh* v. *Blakey* (1878), 3 C. P. D. 136), but the Bills of Exchange Act, 1878 (41 & 42 Vict. c. 13) (repealed, but as to this provision re-enacted, by the present Act), was immediately passed to overrule this decision. For forms of acceptance, see Encyclopædia of Forms, Vol. II., p. 512.

(*i*) See *Young* v. *Glover* (1857), 3 Jur. (N. S.) 637.

(*k*) Bills of Exchange Act, 1882 (45 & 46 Vict. c. 61), s. 17 (2) (b); *Russell* v. *Phillips* (1850), 14 Q. B. 891.

(*l*) Bills of Exchange Act, 1882 (45 & 46 Vict. c. 61), s. 19 (1).

(*m*) *Ibid.*, s. 19 (2).

(*n*) *Ibid.*, s. 19 (2). For forms of qualified acceptance, see Encyclopædia of Forms, Vol. II., p. 512.

(*o*) *Meyer & Co.* v. *Decroix, Verley et Cie.*, [1891] A. C. 520, where the drawee wrote above his acceptance "in favour of Mr. L. Delobbel Flipo only," the bill being drawn payable "to order Mr. L. Delobbel Flipo," and this was held not to be a qualified acceptance.

(*p*) *Fanshawe* v. *Peet* (1857), 26 L. J. (EX.) 314, where it was held that an addition to his acceptance by the drawee of words giving a wrong date for the maturity of the bill did not prevent the acceptance being general. But see *Sproat* v. *Matthews* (1786), 1 Term Rep. 182.

(*q*) Bills of Exchange Act, 1882 (45 & 46 Vict. c. 61), s. 44 (1). Compare the following passage from Bayley, Summary of the Law of Bills of Exchange etc., 6th ed., chap. 6, s. 3, p. 202: "Though any acceptance varying from the tenor will bind the person making it, the holder of a bill is entitled from the undertaking of the drawer and indorser to expect an absolute acceptance from the drawee (or, if there be several not connected in partnership, by each) for the payment of the full sum of money mentioned therein according to its tenor, specifying, if none be mentioned for the purpose, a place for its payment and expressing, if the bill be payable within a limited time after sight, the time of its presentment for acceptance; and he may reject any other." And see Story, Bills of Exchange, 6th ed. s. 240.

But when a bill is a foreign bill, and the qualification attaching to the acceptance is "partial," the holder cannot treat the bill as dishonoured. He can only protest the bill in respect of the balance which was not accepted (Bills of Exchange Act, 1882 (45 & 46 Vict. c. 61), s. 44 (2)).

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If he consents to take a qualified acceptance, he should at once inform the drawer and indorsers, since in such case (*r*), if the drawer or an indorser has not expressly or impliedly authorised him to take it or does not subsequently assent thereto, the drawer or indorser in question is discharged from liability on the bill (*s*).

When, however, the drawer or indorser has had notice of the qualified acceptance, and does not within a reasonable time dissent therefrom, he is deemed to have assented to it (*t*).

When, by the terms of a qualified acceptance, presentment for payment is required, the acceptor, in the absence of an express stipulation to that effect, is not discharged by the omission to present the bill for payment on the day that it matures (*a*).

Kinds of qualified acceptance.

829. An acceptance may be qualified in a variety of ways: (1) it may be conditional, *i.e.*, it may make payment of the bill by the acceptor dependent on the fulfilment of a condition stated by him in his acceptance (*b*); or (2) it may be partial, *i.e.*, an acceptance to pay part only of the amount for which the bill is drawn (*c*); or (3) it may be local, *i.e.*, to pay only at a particular specified place (*d*) —unless, however, the acceptance is expressed to be paid there and there only, it will be regarded as a general acceptance; or (4) it may be qualified as to time (*e*); or, finally (5), it may be qualified by being accepted by one or more of the drawees, but not by all (*f*).

(*r*) This is not so in the case of a partial acceptance where notice is duly given (Bills of Exchange Act, 1882 (45 & 46 Vict. c. 61), s. 44 (2)).

(*s*) *Ibid.*, s. 44 (2).

(*t*) *Ibid.*, s. 44 (3).

(*a*) *Ibid.*, s. 52 (2); *Smith* v. *Vertue* (1860), 30 L. J. (C. P.) 56.

(*b*) Bills of Exchange Act, 1882 (45 & 46 Vict. c. 61), s. 19 (2) (a). *E.g.*, where the acceptance is to pay when goods conveyed to the drawee are sold (*Smith* v. *Abbot* (1741), 2 Stra. 1152), or when in cash for the cargo of a ship (*Julian* v. *Shobrooke* (1753), 2 Wils. 9). See also *Pierson* v. *Dunlop* (1777), Cowp. 571; *Banbury* v. *Lisset* (1744), 2 Stra. 1211; *Smith* v. *Vertue*, *supra*.

(*c*) Bills of Exchange Act, 1882 (45 & 46 Vict. c. 61), s. 19 (2) (b); *Wegersloffe* v. *Keene* (1719), 1 Stra. 214. An acceptance "as far as £100 part thereof" of a bill for £127 is a valid, though qualified, acceptance. So, too, when the drawee accepted a bill partly in cash, partly in bills, the acceptance was held to be a valid, though qualified, acceptance in regard to the part accepted in cash (*Petit* v. *Benson* (1697), Comb. 452).

(*d*) Bills of Exchange Act, 1882 (45 & 46 Vict. c. 61), s. 19 (2) (c). Bills are very frequently accepted "payable at Messrs. " (the drawee's bankers), and this is a general acceptance, but when stated to be "payable at Messrs. , and not elsewhere," the acceptance is qualified (*Sebag* v. *Ahitbol* (1816), 4 M. & S. 462). The word "only" need not be actually used (*Higgins* v. *Nichols* (1839), 7 Dowl. 551). And see *Halstead* v. *Skelton* (1843), 5 Q. B. 86; *Sproat* v. *Matthews* (1786), 1 Term Rep. 182; *Rhodes* v. *Gent* (1821), 5 B. & Ald. 244.

(*e*) Bills of Exchange Act, 1882 (45 & 46 Vict. c. 61), s. 19 (2) (d). When a bill was dated November 28, 1836, payable forty-two months after date, and was accepted "on the condition of its being renewed until November 28, 1844, without interest payable by me at Messrs. ," the acceptance was held to be good though qualified by time (*Russell* v. *Phillips* (1850), 14 Q. B. 891).

(*f*) Bills of Exchange Act, 1882 (45 & 46 Vict. c. 61), s. 19 (2) (e). See also s. 6 (2), and p. 471, *ante*.

SECT. 8.—*Capacity and Authority of Parties.*

SECT. 8. Capacity and Authority of Parties.

SUB-SECT. 1.—*In General.*

830. In general capacity to incur liability as a party to a bill or note is co-extensive with capacity to contract (*g*). Capacity to incur liability.

The signature of any party possessing such capacity may be written either by himself or by some other person acting by or under his authority (*h*).

The person to whom liability is to attach must have capacity to sign. The person who actually signs must, if he be not the person liable, have his authority to do so. There are, therefore, certain broad distinctions between capacity and authority (*i*). Authority to sign.

Capacity means power to contract so as to bind oneself; authority means power to contract on behalf of another so as to bind him. Capacity is a matter of law; authority, as derived from the act of the parties, is usually a question of fact (*k*).

SUB-SECT. 2.—*Restrictions on Capacity and Authority.*

831. The principal instances of want of capacity are—(1) lunatics; (2) infants or minors; (3) non-trading corporations. But in addition to these there are certain classes to which special disabilities attach. Restrictions.

Thus the clergy are debarred from engaging in trade for lucre or profit (*l*), but this prohibition only renders them liable to ecclesiastical punishments, and does not make void any instruments to which they have become parties (*m*). They cannot escape liability on instruments even if the other parties to the instrument know that they are dealing with clergymen (*n*). Clergy.

Certain special disabilities attach to bankers and banking companies in England and Wales other than the Bank of England in regard to the issue etc. of bills or notes, which in legal effect are payable to bearer on demand (*o*). Bankers.

A married woman can bind herself as a party to a bill or note, and thereby incur liability within the limits of her separate estate so far as it is free from restraint on anticipation (*p*). Married women.

(*g*) Bill of Exchange Act, 1882 (45 & 46 Vict. c. 61), s. 22 (1). See title CONTRACT.

(*h*) Bills of Exchange Act, 1882 (45 & 46 Vict. c. 61), s. 91.

(*i*) Chalmers, Bills of Exchange, 6th ed. p. 61. The distinction between capacity and authority is best illustrated by the difference between a non-trading corporation and a non-trading private partnership. The non-trading corporation cannot incur liability on a bill, while a member of a non-trading partnership may be authorised by his partners to incur such a liability, or, having done so, his act may be ratified by them.

(*k*) *Ibid.*

(*l*) Pluralities Act, 1838 (1 & 2 Vict. c. 106).

(*m*) *Ibid.*, s. 31.

(*n*) *Lewis* v. *Bright* (1855), 4 E. & B. 917.

(*o*) Bank Charter Act, 1844 (7 & 8 Vict. c. 32); Stamp Act, 1854 (17 & 18 Vict. c. 83), s. 11. See title BANKERS AND BANKING, Vol. I., pp. 570—576.

(*p*) Married Women's Property Act, 1882 (45 & 46 Vict. c. 75); Married Women's Property Act, 1893 (56 & 57 Vict. c. 63). As to Scotland, see the Married Women's Property (Scotland) Act, 1881 (44 & 45 Vict. c. 21). See generally, title HUSBAND AND WIFE.

SECT. 8. Capacity and Authority of Parties.

She can also, in any case, by her indorsement transfer the property in such an instrument.

A married woman on becoming a widow or on being divorced or judicially separated from her husband resumes the status of a *feme sole* in respect of her capacity to contract (*q*).

Lunatics etc.

832. Contracts made by lunatics, idiots, and generally all persons of unsound mind are voidable, not void (*r*). Such persons, therefore, incur by their signature to a bill or note no liability to anyone who is aware of their condition, but that condition is not a defence against a holder for value without notice (*s*).

The same is true of one who is completely drunk (*t*); but partial drunkenness would not seem to be a defence, unless the defendant can prove that his condition is directly due to the design of the party bringing the action (*a*).

Infants.

833. An infant (*b*) cannot make himself liable as either drawer, acceptor, or indorser of a bill of exchange or promissory note (*c*), even if it be for necessaries supplied (*d*); but if the instrument has been drawn or indorsed by him, the holder is entitled to receive payment and to enforce the instrument as against any other party thereto (*e*).

An infant cannot even by ratification after he attains his majority convert an instrument drawn, accepted, or indorsed by him during infancy into a valid instrument as against himself (*f*); nor is he

(*q*) But in the case of a note made during marriage and an action brought thereon after the husband's death, property as to which the married woman is restrained from anticipation does not on account of the husband's death become available to meet liabilities incurred during coverture (*Brown* v. *Dimbleby*, [1904] 1 K. B. 28). See *Softlaw* v. *Welch*, [1899] 2 Q. B. 419; *Pelton* v. *Harrison*, [1891] 2 Q. B. 422; *Beckett* v. *Tasker* (1887), 19 Q. B. D. 7. The rule is similar in the case of a divorced woman (*Barnett* v. *Howard*, [1900] 2 Q. B. 784).

(*r*) See title LUNATICS AND PERSONS OF UNSOUND MIND.

(*s*) *Imperial Loan Co.* v. *Stone*, [1892] 1 Q. B. 599. See also *Brown* v. *Jodrell* (1827), 3 C. & P. 30, and *Levy* v. *Baker* (1827), 1 Mood. & M. 106, n. Compare *Re Whitaker* (1889), 42 Ch. D. 119.

(*t*) *Gore* v. *Gibson* (1845), 13 M. & W. 623.

(*a*) *Johnson* v. *Medlicott* (1734), 3 P. Wms. 130, n.; *Cooke* v. *Clayworth* (1811), 18 Ves. 12.

(*b*) An infant is in Scottish law termed a minor.

(*c*) Infants' Relief Act, 1874 (37 & 38 Vict. c. 62); Betting and Loans (Infants) Act, 1892 (55 & 56 Vict. c. 4). See title INFANTS. Originally, though an infant could not engage in trade and bind himself by becoming a party to a bill of exchange, his contract in regard to such a bill might be voidable at his election, not absolutely void, and it used to be held that if he engaged in trade or dealt in bills or notes he was estopped from setting up a plea of infancy. See *Ex parte Lynch, Re Lynch* (1876), 2 Ch. D. 227; but now see *Ex parte Jones, Re Jones* (1881), 18 Ch. D. 109.

(*d*) *Re Soltykoff, Ex parte Margrett*, [1891] 1 Q. B. 413. It was formerly held that an infant might give a single bill (*i.e.*, bond) for the exact sum due for necessaries (Co. Litt. 172 a), but this could not be a negotiable bill or one which carried interest (*Williamson* v. *Watts*, 1 Camp. 552, 553, n.).

(*e*) Bills of Exchange Act, 1882 (45 & 46 Vict. c. 61), s. 22 (2); *Grey* v. *Cooper* (1782), 3 Doug. (K. B.) 65; *Taylor* v. *Croker* (1802), 4 Esp. 187.

(*f*) Infants' Relief Act, 1874 (37 & 38 Vict. c. 62), s. 2; *Ex parte Kibble, Re Onslow* (1875), 10 Ch. App. 373.

liable to a person with notice on a bill or note given after he attains his majority to replace one given previously thereto (*g*). Where, however, a bill is drawn during the drawee's minority, but accepted by him after he attains his majority, it is valid and may be enforced against him (*h*).

Corporations.

834. Joint stock companies and other corporations may or may not be constituted for the purpose of trading. "Trade" in this connection is given a much more restricted meaning than "business" (*i*). To ascertain whether they are so constituted or not it is necessary in the case of companies incorporated under the Companies Acts (*j*) to examine their memorandum and articles of association so as to discover whether dealing in bills is or is not essential or conducive to the purposes for which they are formed (*k*).

Non-trading corporations.

A non-trading company or corporation is not *primâ facie* (*i.e.*, unless the power is expressly or impliedly given by the Act of Parliament (*l*), charter, or other instrument creating it) able to incur liability on a bill of exchange or promissory note (*m*).

Where, however, an instrument has been drawn or indorsed by such a non-trading company or corporation the holder is entitled to have the instrument paid and to enforce it against any other party thereto (*n*).

Trading corporations.

When the signature on an instrument is that of a trading, not a non-trading, company, *i.e.*, when it is that of a company having capacity to incur liability on a bill, two further questions arise, namely: (1) Is it in such form as to bind the company? (2) Was it placed there by the proper person or persons to act under the authority of the

(*g*) Betting and Loans (Infants) Act, 1892 (55 & 56 Vict. c. 4), s. 5; see *Smith* v. *King*, [1892] 2 Q. B. 543.

(*h*) *Stevens* v. *Jackson* (1815), 4 Camp. 164.

(*i*) See *Harris* v. *Amery* (1865), L. R. 1 C. P., *per* WILLES, J., at p. 154. Thus the following have been held to be non-trading corporations: a mining company (*Dickinson* v. *Valpy* (1829), 10 B. & C. 128); a cemetery company (*Harmer* v. *Steele* (1849), 19 L. J. (EX.) 34); a gas company (*Bramah* v. *Roberts* (1837), 3 Bing. (N. C.) 963); a salt and alkali company (*Bult* v. *Morrell* (1840), 12 Ad. & El. 745); a salvage company (*Thompson* v. *Universal Salvage Co.* (1848), 1 Exch. 694); and see *Bateman* v. *Mid Wales Rail. Co.* (1866), L. R. 1 C. P. 499, 505.

(*j*) The Companies Acts do not enable companies to incur liabilities on bills; they merely prescribe the manner in which companies having the capacity may exercise it (Chalmers, Bills of Exchange, 6th ed. p. 65).

(*k*) When a company has been incorporated for the purpose of constructing railways abroad and the directors are empowered by the memorandum and articles of association "to do all things and make and perform all contracts which in their judgment are necessary and proper for the purpose of carrying into effect the object mentioned in the memorandum of association," it has the requisite capacity for drawing, accepting or indorsing bills (*Peruvian Railways Co.* v. *Thames and Mersey Marine Insurance Co.*, *Re Peruvian Railways Co.* (1867), 2 Ch. App. 617). But this is not so in the case of an English railway company incorporated in the ordinary way by Act of Parliament (*Bateman* v. *Mid Wales Rail. Co.* (1866), L. R. 1 C. P. 499).

(*l*) See, *e.g.*, *Slark* v. *Highgate Archway Co.* (1814), 5 Taunt. 792, and *Murray* v. *East India Co.* (1821), 5 B. & Ald. 204.

(*m*) It is, however, within their competence to draw cheques for the purpose of their own business. See title BANKERS AND BANKING, Vol. I., p. 588, and title CORPORATIONS.

(*n*) Bills of Exchange Act, 1882 (45 & 46 Vict. c. 61), s. 22 (2).

SECT. 8. Capacity and Authority of Parties.

company (*o*)? As to (1), it is specially provided that when any instrument or writing is required to be signed by a corporation, it is sufficient, though not obligatory, that it should be sealed with the corporate seal (*p*). As to (2), it is evident that, just as in all other questions of authority, the point to be decided is one of fact in each case, but the address to the drawee should in every case be most carefully compared with the form of the acceptance (*q*).

Companies under the Companies Acts.

Every company incorporated under the Companies Acts is compelled to have its name engraven in legible characters on its seal, and mentioned in legible characters in all bills of exchange, promissory notes, indorsements, cheques and orders for money or goods purporting to be signed by or on behalf of such company (*r*).

If any director, manager or officer of the company infringes or authorises the infringement of this provision, he is liable to a penalty of fifty pounds, and is personally liable to the holder of the instrument in respect of which the provision was infringed (*s*).

A bill of exchange or promissory note is deemed to have been drawn, made, accepted or indorsed on behalf of the company if it has been drawn, made, accepted or indorsed in the name of the company or on behalf or on account of the company by any person acting under the authority of the company (*t*).

Partnerships.

835. All firms with two or more partners are to be distinguished in respect of their being constituted for trading or non-trading (*a*) purposes.

Trading partnerships.

A partner in a trading firm has full power to incur liability on behalf of his firm as a party to a bill or note for any purpose of the firm that falls within the scope of its ordinary business, and the signature by him of the firm's name will bind all his partners equally with himself (*b*); but he has no authority to bind the firm

(*o*) Chalmers, Bills of Exchange, 6th ed. p. 283; and see title COMPANIES.

(*p*) Bills of Exchange Act, 1882 (45 & 46 Vict. c. 61), s. 91 (2).

(*q*) See *Jones* v. *Jackson* (1870), 22 L. T. 828.

(*r*) Companies Act, 1862 (25 & 26 Vict. c. 89), s. 41. The provisions of this and amending Acts in regard to negotiable instruments are specially preserved by the Bills of Exchange Act, 1882 (45 & 46 Vict. c. 61), s. 97 (3) (b).

(*s*) Companies Act, 1862 (25 & 26 Vict. c. 89), s. 42; *Nassau Steam Press* v. *Tyler* (1894), 70 L. T. 376. Compare *Dermatine Co.* v. *Ashworth* (1905), 21 T. L. R. 510.

(*t*) Companies Act, 1862 (25 & 26 Vict. c. 89), s. 47.

(*a*) Partnership is the relation between persons carrying on a business in common with a view to profit (Partnership Act, 1890 (53 & 54 Vict. c. 39), s. 1). Whether or not the firm is a trading firm must in each case depend on the nature of the business (*Dickinson* v. *Valpy* (1829), 10 B. & C. 128). See generally, title PARTNERSHIP.

The following partnership businesses have been held to be non-trading: mining (*Brown* v. *Byers* (1847), 16 L. J. (EX.) 112); farming (*Greenslade* v. *Dower* (1828), 7 B. & C. 635); quarry workers (*Thicknesse* v. *Bromilow* (1832), 2 C. & J. 425); solicitors (*Hedley* v. *Bainbridge* (1842), 3 Q. B. 316); auctioneers (*Wheatley* v. *Smithers*, [1906] 2 K. B. 321, reversed in Court of Appeal without expression of opinion on this point, [1907] 2 K. B. 684).

Banking has been held to be trading (*Bank of Australasia* v. *Breillat* (1847), 6 Moo. P. C. C. 152).

(*b*) Bills of Exchange Act, 1882 (45 & 46 Vict. c. 61), s. 23 (2). See also the Partnership Act, 1890 (53 & 54 Vict. c. 39), and title PARTNERSHIP; *Pinkney* v. *Hall* (1697), 1 Ld. Raym. 175; *Lewis* v. *Reilly* (1841), 1 Q. B. 349.

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in any matter outside the scope of its ordinary business (*c*). Accepting bills in blank is not a mercantile business transaction the power to do which can be implied from the existence of an ordinary trading partnership (*d*).

Limitations on partner's authority.

If there is an agreement between partners restricting the power of one or more of them to bind the firm, no act done in contravention thereof is binding on the firm with respect to persons having notice (*e*); but the firm is liable to a holder in due course (*f*).

A partner cannot bind his firm if in signing he varies the true style of the firm's name (*g*).

If he becomes bankrupt, he cannot bind his firm, but when the bankruptcy is not notified the firm remains liable to holders without notice (*h*).

If he signs a joint and several note for himself and his partners, he cannot bind them severally (*i*), but he does bind himself and them jointly (*k*) and himself separately (*l*).

Where two partners without each other's knowledge sign the firm's name on two separate bills to satisfy the same debt, the firm may be liable on both bills should they pass into the hands of holders in due course (*m*).

Where two separate firms to each of which the same partner belongs carry on business under the same style, and one of them incurs liability as a party to a bill or note, the other cannot be held liable even as against a holder in due course (*n*).

Non-trading partnership.

A partner in a non-trading firm has no power (*o*), unless specially authorised (*p*), to incur liability on behalf of the firm on a bill or

(*c*) *Re Cunningham & Co., Ltd., Simpson's Claim* (1887), 36 Ch. D. 532. As a partner has already full powers to bind his firm on partnership bills, it seems that if a fellow-partner who is going abroad grants him a power of attorney to deal with bills, such power applies to non-partnership bills only (*Attwood* v. *Munnings* (1827), 7 B. & C. 278).

(*d*) *Hogarth* v. *Latham & Co.* (1878), 3 Q. B. D. 643; and see *Awde* v. *Dixon* (1851), 6 Exch. 869.

(*e*) Partnership Act, 1890 (53 & 54 Vict. c. 39), s. 8; compare *Ex parte Darlington District Joint Stock Banking Co., Re Riches* (1865), 34 L. J. (BCY.) 10.

(*f*) But the onus of proof that he took the bill without notice and for value is on the holder (*Hogg* v. *Skeen* (1865), 34 L. J. (C. P.) 153).

(*g*) Where a bill is indorsed under a wrong style to a firm, and one of the partners, with the authority of the other, indorses it in the same style to another party, the property in the bill is transferred, but the firm is not liable on the indorsement (see *Williamson* v. *Johnson* (1823), 1 B. & C. 146). Compare Bills of Exchange Act, 1882 (45 & 46 Vict. c. 61), s. 23 (2), and *Kirk* v. *Blurton* (1841), 9 M. & W. 284.

(*h*) Partnership Act, 1890 (53 & 54 Vict. c. 39), s. 38; *Thomason* v. *Frere* (1809), 10 East, 418; *Lacy* v. *Woolcott* (1823), 2 Dow. & Ry. (K. B.) 458. See also title BANKRUPTCY AND INSOLVENCY, *ante*.

(*i*) *Perring* v. *Hone* (1826), 4 Bing. 28.

(*k*) *Maclae* v. *Sutherland* (1854), 3 E. & B. 1.

(*l*) *Elliot* v. *Davis* (1800), 2 Bos. & P. 338; *Gillow* v. *Lillie*, 1 Bing. (N. C.) 695.

(*m*) *Davison* v. *Robertson* (1815), 3 Dow, 218.

(*n*) Compare *Yorkshire Banking Co.* v. *Beatson* (1880), 5 C. P. D. 109.

(*o*) When a partner in a non-trading firm has no power to bind his firm, he may yet have sufficient authority to transfer the property in a bill (*Smith* v. *Johnson* (1858), 27 L. J. (EX.) 363; and see *Heilbut* v. *Nevill* (1870), L. R. 5 C. P. 478). Compare Bills of Exchange Act, 1882 (45 & 46 Vict. c. 61), s. 22 (2).

(*p*) If a member of a non-trading firm has been authorised to draw a bill, he

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note, but, should he do so, there is nothing to prevent a subsequent ratification of his act by the other members of the firm.

Trade name.

836. Where any person signs an instrument in a trade or assumed name he is liable thereon as if he had signed it in his own name (*q*).

SUB-SECT. 3.—*Extent of Agent's Authority.*

Extent of agent's authority.

837. A signature may be written by some other person by or under the authority of the person whose signature is required (*r*). In this case the person signing is an agent. It is open to anyone, even an infant, to be an agent so long as his authority is sufficient. The authority to sign may be created in any terms; it may be express or implied (*s*), and it may be for a special purpose or not.

But a general authority to transact business and to receive and discharge debts does not in itself confer upon an agent the power of accepting and indorsing bills or notes so as to charge his principal (*t*).

Mode of signing by agent.

838. An agent may simply sign in the name of his principal, or by signing by procuration or otherwise indicate that he does so in the capacity of agent. The important points are the signature and the authority to place it on the instrument, which in the last resort is a matter of evidence (*a*).

When the agent signs by procuration, the form of the signature operates as notice that he has but a limited authority to sign, and the principal is only bound by such signature if the agent in so signing was acting within the actual limits of his authority (*b*). But where the agent has authority, the fact that he may have abused his authority does not affect the rights of the holder (*c*).

Where an agent has drawn an instrument *per pro.* outside the scope of his authority, the principal is not liable on the instrument, though he must account for any money which has come into his possession (*d*).

has implied authority to indorse in the firm's name for the purpose for which the bill was drawn (*Lewis* v. *Reilly* (1841), 1 Q. B. 349); and see *Garland* v. *Jacomb* (1873), L. R. 8 Exch. 216, 220.

(*q*) Bills of Exchange Act, 1882 (45 & 46 Vict. c. 61), s. 23 (1). See *Wilde* v. *Keep* (1834), 6 C. & P. 235; *Edmunds* v. *Bushell* (1865), L. R. 1 Q. B. 97; compare *Alliance Bank* v. *Kearsley* (1871), L. R. 6 C. P. 433. See also p. 485, *ante*.

(*r*) Bills of Exchange Act, 1882 (45 & 46 Vict. c. 61), s. 91 (1).

(*s*) *Edmunds* v. *Bushell*, *supra*; and see generally title AGENCY, Vol. I., pp. 169, 208.

(*t*) *Murray* v. *East India Co.* (1821), 5 B. & Ald. 204; *Hogg* v. *Snaith* (1808), 1 Taunt. 347; *Esdaile* v. *La Nauze* (1835), 1 Y. & C. (EX.) 394.

(*a*) *Lord* v. *Hall* (1849), 8 C. B. 627, where in the case of a man whose affairs were managed by his wife his signature was actually written, not by his wife, but by his daughter in his wife's presence and with her authority. See especially *per* MAULE, J., at p. 631, commenting on *Ex parte Sutton*, *Re Marshall* (1788), 2 Cox, Eq. Cas. 84.

(*b*) Bills of Exchange Act, 1882 (45 & 46 Vict. c. 61), s. 25; *Attwood* v. *Munnings* (1827), 7 B. & C. 278; *National Bank of Scotland* v. *Dewhurst* (1896), 1 Com. Cas. 318. Compare *West London Commercial Bank* v. *Kitson* (1884), 13 Q. B. D. 360, and see generally title AGENCY, Vol. I., pp. 219 *et seq.*

(*c*) *Jonmenjoy Coondoo* v. *Watson* (1884), 9 App. Cas. 561; *Bryant, Powis and Bryant* v. *Banque du Peuple*, [1893] A. C. 170.

(*d*) *Reid* v. *Rigby & Co.*, [1894] 2 Q. B. 40.

Forged and unauthorised signatures.

839. Where a signature on a bill or note is forged or placed thereon without the authority of the person whose signature it purports to be, the forged or unauthorised signature is wholly inoperative, and no right to retain the instrument or to give a discharge therefor or to enforce payment thereof against any party thereto can be acquired through or under that signature unless the party against whom it is sought to retain or enforce payment of the instrument is precluded from setting up the forgery or want of authority (*e*).

Apart from estoppel created by conduct, the acceptor cannot deny the genuineness of the drawer's signature or his authority to draw (*f*), and an indorser cannot deny to a holder in due course the genuineness and regularity in all respects of the signature of the drawer and all previous indorsers (*g*).

In the absence of forgery, however, the principal may in all cases ratify the agent's action (*h*).

Rule for determining whether agent signs as agent.

840. In determining whether a signature on an instrument is that of the principal or that of the agent by whose hand it is written, the construction is adopted which is most favourable to the validity of the instrument (*i*).

Liability of agent.

841. The mere signature of an agent in his own name with the word "agent" added does not exempt him from personal liability (*k*).

Persons who are not, strictly speaking, agents may nevertheless sign bills or notes in a representative capacity, but in order to escape personal liability they must sign in such a form as to indicate that such liability is disclaimed. The mere addition of words describing the signer as filling a representative capacity is insufficient (*l*).

(*e*) Bills of Exchange Act, 1882 (45 & 46 Vict. c. 61), s. 24; *Mead* v. *Young* (1790), 4 Term Rep. 28; *Robarts* v. *Tucker* (1851), 16 Q. B. 560. This proposition is, however, qualified by certain provisions as to the liability of bankers in dealing with crossed cheques etc. See Bills of Exchange Act, 1882 (45 & 46 Vict. c. 61), ss. 60, 80, 82; Bills of Exchange (Crossed Cheques) Act, 1906 (6 Edw. 7, c. 17); and see title BANKERS AND BANKING, Vol. I., pp. 608 *et seq.*

(*f*) Bills of Exchange Act, 1882 (45 & 46 Vict. c. 61), s. 54 (2) (a); see *Bank of England* v. *Vagliano Brothers*, [1891] A. C. 107.

(*g*) Bills of Exchange Act, 1882 (45 & 46 Vict. c. 61), s. 55 (2) (b); compare *Heilbut* v. *Nevill* (1870), L. R. 5 C. P. 478; and see p. 520, *post*.

(*h*) *Ancona* v. *Marks* (1862), 31 L. J. (EX.) 163. As to ratification of forged signature, see title AGENCY, Vol. I., p. 174.

(*i*) Bills of Exchange Act, 1882 (45 & 46 Vict. c. 61), s. 26 (2).

(*k*) *Ibid.*, s. 26 (1), as to this, see, further, p. 523, *post*.

(*l*) *Ibid.*, s. 26 (1). The extent of this provision has yet to be proved, but it would not appear to be very wide, if judged by the light of such relevant decisions as exist. A note for the payment of money lent to a parish, and signed by the churchwardens as such, has been held to bind them personally (*Rew* v. *Pettet* (1834), 1 Ad. & El. 196), and drafts on a banker by inclosure commissioners have had a similar effect (*Eaton* v. *Bell* (1821), 5 B. & Ald. 34). Where four directors of a company signed a promissory note in the following form, "We the directors of promise to pay ," they were held liable personally, even though the seal of the company was placed in one corner of the note and purported to be witnessed by another party (*Dutton* v. *Marsh* (1871), L. R. 6 Q. B. 361; and see *Courtauld* v. *Saunders* (1867), 16 L. T. 562). But where the

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SECT. 9.—*Consideration.*

SUB-SECT. 1.—*The Presumption of Consideration.*

Presumption of consideration.

842. It has been already stated that bills of exchange and promissory notes, unlike other forms of simple contract, are presumed to stand upon the basis of a valuable consideration (*m*).

Not only is this so in the case of the immediate parties to the bill or note, but it is so also in the case of those who become parties to it subsequently by indorsement, for every party whose signature appears on a bill is *primâ facie* deemed to have become a party thereto for value (*n*).

The effect of the presumption, therefore, is that it shifts the burden of proof from the shoulders of the plaintiff who relies upon the instrument to those of the defendant who impugns it.

SUB-SECT. 2.—*The Meaning of Consideration.*

Meaning of consideration.

843. Valuable consideration was in former days said in general terms to consist "either in some right, interest, profit or benefit, accruing to the one party, or some forbearance, detriment, loss, or responsibility given, suffered, or undertaken by the other" (*o*).

By the statutory (*p*) definition of to-day valuable consideration for

secretary of a company signed a promissory note thus, "for the company, John Sizer, secretary," he was held not to be personally liable (*Alexander* v. *Sizer* (1869), L. R. 4 Exch. 102); but see *Gray* v. *Raper* (1866), L. R. 1 C. P. 694, and *M'Meekin* v. *Easton* (1889), 16 R. (Ct. of Sess.) 366, where a note in the form, "We, the undersigned, in the name and on the behalf of the Reformed Presbyterian Church, Stranraer, promise to pay," was held to bind the signatories personally. See also title AGENCY, Vol. I., p. 221.

The statute would no doubt be construed with greater liberality in the case of administrators and executors. Thus, on the death of the holder of a bill or note the executors or administrators may indorse so as to negative personal liability, see p. 506, *post*. But where an executor at the direction of his testator carried on business and signed bills in his own name as "executor of ," he was held liable personally (*Liverpool Borough Bank* v. *Walker* (1859), 4 De G. & J. 24). See *Childs* v. *Monins* (1821), 2 Brod. & Bing. 460.

(*m*) See p. 461, *ante*.

(*n*) Bills of Exchange Act, 1882 (45 & 46 Vict. c. 61), s. 30 (1). The word "value" means "valuable consideration" (*ibid.*, s. 2).

(*o*) *Currie* v. *Misa* (1875), L. R. 10 Exch. 162. See Story, Bills of Exchange, 6th ed. s. 183.

(*p*) Bills of Exchange Act, 1882 (45 & 46 Vict. c. 61), s. 27 (1) (a), (b). In the absence of valuable consideration an action on an instrument, as on any other simple contract, would fail. Thus where an instrument is given as a present the donee cannot maintain an action against the donor thereon (*Milnes* v. *Dawson* (1850), 5 Exch. 948, *per* PARKE, B., at p. 950; *Holliday* v. *Atkinson* (1826), 5 B. & C. 501). Where a note was originally given for no consideration, the renewal of the note from time to time, even with interest added, will not make it valid (*Edwards* v. *Chancellor* (1888), 52 J. P. 454). Neither in law nor in equity can the payee of a promissory note, which appears on the facts before the court to be voluntary, have any claim as a creditor (*Re Whitaker* (1889), 42 Ch. D. 119, *per* COTTON, L.J., at p. 124).

A voluntary gift of money does not fulfil the requirement of a valuable consideration; but where a sum of money passed from one, subsequently deceased, to another, and might have been regarded either as a gift or a loan, the giving by the payee of a note for the amount will be taken to show that the payment was a loan (*Hill* v. *Wilson* (1873), 8 Ch. App. 888).

Where by a misrepresentation, although innocent, the defendant is induced

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an instrument may be constituted by either—(1) any consideration sufficient to support a simple contract (*q*), or (2) an antecedent debt or liability (*r*).

Total failure of consideration.

In the absence or subsequent failure of consideration, the instrument is invalid as between parties in immediate relationship, but not as between remote parties when the holder is a holder for value (*s*).

Partial failure of consideration.

Where the consideration for which a party signed a bill or note consists of a definite sum of money or of something the value of which is definitely ascertained in money, and it was either originally absent in part or has subsequently failed in part, the sum which a holder standing in immediate relation to such party is entitled to receive from him is *pro tanto* reduced (*a*). But a remote party who has given value for the instrument may be entitled to receive payment in full (*b*).

Inadequacy of consideration.

As the object of requiring consideration for a bill or note, as for any other simple contract, is to secure some criterion as to whether the parties ever really intended to contract with one

to give a note, there is no valid consideration (*Southall* v. *Rigg* and *Forman* v. *Wright* (1851), 11 C. B. 481). A merely moral obligation is insufficient to support a bill (*Eastwood* v. *Kenyon* (1840), 11 Ad. & El. 438); but the promise to give up a will, thought by the holder to be invalid, is sufficient (*Smith* v. *Smith* (1863), 13 C. B. (N. S.) 418). So, too, is the existence of a debt which could not in fact be recovered owing to the Statute of Limitations (*La Touche* v. *La Touche* (1865), 3 H. & C. 576), or the fact that a thief would have been obliged to return stolen securities. See *London and County Banking Co.* v. *London and River Plate Bank* (1888), 21 Q. B. D. 535, where a clerk in the employment of the defendants stole securities and sold them to the plaintiffs, but by a trick obtained them back in time to replace them in the defendants' safe before the audit, and on action brought by the plaintiffs as *bonâ fide* holders it was held that the defendants were entitled to retain the securities on the above ground irrespective of the fact that at the time that the securities were returned they were ignorant of the theft.

Where the consideration is past it must not have been of a purely voluntary character (*Lampleigh* v. *Brathwait* (1615), Hob. 105, Smith, L. C., 11th ed. p. 141). See title CONTRACT.

Thus forbearance to sue for a debt constitutes a valid consideration (*Crears* v. *Hunter* (1887), 19 Q. B. D. 341). But the forbearance must either include a promise to forbear or the actual forbearance must be at the request, express or implied, of the defendant. The mere fact of forbearance by itself would not be sufficient (*ibid.*, *per* LOPES, L.J., at p. 346).

(*q*) See title CONTRACT.

(*r*) As to this generally, see *Poirier* v. *Morris* (1853), 22 L. J. (Q. B.) 313. It is immaterial whether the bill is payable on demand or at a future time (Bills of Exchange Act, 1882 (45 & 46 Vict. c. 61), s. 27 (1) (b)); and see *Currie* v. *Misa* (1875), L. R. 10 Exch. 153, affirmed by House of Lords, *sub nom. Misa* v. *Currie* (1876), 1 App. Cas. 554, cited with approval in *Fleming* v. *Bank of New Zealand*, [1900] A. C. 577, *per cur.* at p. 586; *Stott* v. *Fairlamb* (1883), 53 L. J. (Q. B.) 47. As to debts owing by customers to their bankers, see *M'Lean* v. *Clydesdale Banking Co.* (1883), 9 App. Cas. 95, and p. 499, *post*.

(*s*) Where defendant has given a note to a person in consideration of his promising to be his executor, and in fact actually survives him, the personal representatives of the latter are not entitled to enforce it (*Solly* v. *Hinde* (1834), 2 Cr. & M. 516).

(*a*) *Day* v. *Nix* (1824) 9 Moore (C. P.) 159; *Forman* v. *Wright* (1851), 11 C. B. 481, 488; compare also *Clark* v. *Lazarus* (1840), 2 Man. & G. 167; *Warwick* v. *Nairn* (1855), 10 Exch. 762; *Tye* v. *Gwynne* (1810), 2 Camp. 346.

(*b*) *Munroe* v. *Bordier* (1849), 8 C. B. 862.

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another, the mere fact that the consideration is inadequate or even nominal does not vitiate the bill. The adequacy of the consideration is not, therefore, in general the subject of inquiry (*c*), but if upon the evidence given there is a patent and gross inadequacy of consideration, the transaction is open to the presumption of fraud (*d*).

When there are cross acceptances, even if for accommodation purposes only with no other basis to the contract, the consideration is deemed adequate (*e*).

SUB-SECT. 3.—*The Effect of Consideration upon the Holder.*

Consideration enures for benefit of holder.

844. Where value has at any time been given for an instrument, the holder is deemed to be a holder for value as regards the acceptor and all parties to the instrument who became parties prior to such time (*f*).

Holder in due course.

Moreover, every holder of an instrument is *primâ facie* deemed to be a holder in due course (*g*).

A holder (whether for value or not) who derives his title to an instrument through a holder in due course, and who is not himself a party to any fraud or illegality affecting it (whether he has notice of the fraud or not (*h*)), has all the rights of that holder in due course as regards the acceptor and all parties to the instrument prior to that holder (*i*). If he gave value for it, he has the same rights against that holder also.

Lien.

845. Any person who discounts an instrument, or to whom an instrument is negotiated for the purpose of being discounted (*k*), is a holder of the instrument for its full value (*l*). But where the holder of an instrument has a lien upon it arising either from contract or by implication of law, or holds it as pledgee, he is deemed to be a holder for value to the extent of the sum for which he has

(*c*) *Solomon* v. *Turner* (1815), 1 Stark. 51. But in the case of unconscionable bargains where the parties contracting are not upon a footing of equality the court may interfere, particularly in the dealings of money-lenders with their clients, see the Money-lenders Act, 1900 (63 & 64 Vict. c. 51), s. 1; *Re a Debtor*, [1903] 1 K. B. 705; *Samuel* v. *Newbold*, [1906] A. C. 461. See title MONEY AND MONEY-LENDERS. And a consideration which is really illusory may be held to have failed (*Young* v. *Gordon* (1896), 23 R. (Ct. of Sess.) 419).

(*d*) *Jones* v. *Gordon* (1877), 2 App. Cas. 616.

(*e*) *Rose* v. *Sims* (1830), 1 B. & Ad. 521; as to accommodation bills generally, see p. 502, *post*.

(*f*) Bills of Exchange Act, 1882 (45 & 46 Vict. c. 61), s. 27 (2); *Hunter* v. *Wilson* (1849), 4 Exch. 489; *Munroe* v. *Bordier* (1849), 8 C. B. 862.

(*g*) Bills of Exchange Act, 1882 (45 & 46 Vict. c. 61), s. 30 (2). For definition of "holder in due course," see p. 464, *ante*.

(*h*) *May* v. *Chapman* (1847), 16 M. & W. 355; *Masters* v. *Ibberson* (1849), 8 C. B. 100.

(*i*) Bills of Exchange Act, 1882 (45 & 46 Vict. c. 61), s. 29 (3).

(*k*) Although the property in it does not pass until it is discounted (*Ex parte Schofield, Re Firth* (1879), 12 Ch. D. 337; *Dawson* v. *Isle*, [1906] 1 Ch. 633).

(*l*) *Giles* v. *Perkins* (1807), 9 East, 12, *per* Lord ELLENBOROUGH, C.J., at p. 14; *Re Gomersall* (1875), 1 Ch. D. 137, *per* MELLISH, L.J., at p. 144. But the holder who has discounted acceptances with notice that they are fraudulent can only prove in the bankruptcy of the acceptor for the amount given by him for them (*ibid.*).

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a lien or of his advance (*m*). He is, however, entitled to enforce payment of the full amount if his transferor could have sued on the instrument, but otherwise can only recover the amount of his lien or advance (*n*). In the former case he is trustee for his transferor of the surplus beyond the amount of his lien or advance (*o*).

This is a case which commonly occurs in the relations of banker and customer (*p*). It is therefore important to distinguish carefully between bills etc. when deposited with bankers as security and when handed to them for discount, as in the latter case the banker becomes a holder for the full value of the bill (*q*).

A bill broker may have a lien in the same way as a banker (*r*).

SUB-SECT. 4.—*Fraud and Illegality.*

Effect of fraud and illegality.

846. Every party to a bill is *primâ facie* deemed to have become a party thereto for value, and every holder is *primâ facie* deemed to be a holder in due course; but when in an action on a bill or note, it is admitted or proved that the acceptance, issue, or subsequent negotiation of the instrument is affected with fraud, duress, or force and fear, or illegality, the burden of proof is shifted unless and until the holder proves that, subsequent to the alleged fraud or illegality, value has in good faith been given by someone for the instrument (*s*).

(*m*) Bills of Exchange Act, 1882 (45 & 46 Vict. c. 61), s. 27 (3). See *Attenborough* v. *Clarke* (1858), 27 L. J. (EX.) 138; *Atwood* v. *Crowdie* (1816), 1 Stark. 483; *Ex parte Newton, Re Bunyard* (1880), 16 Ch. D. 330. But the presumption is that a holder holds absolutely and not by way of security (*Hills* v. *Parker* (1866), 14 L. T. 107; *Re Boys, Ex parte Hop Planters' Co.* (1870), L. R. 10 Eq. 467).

(*n*) *Peacock* v. *Pursell* (1863), 32 L. J. (C. P.) 266, *per* BYLES, J., at p. 268.

(*o*) *Reid* v. *Furnival* (1833), 1 Cr. & M. 538; *Cooke* v. *Lister* (1868), 32 L. J. (C. P.) 121, *per* WILLES, J., at p. 127.

(*p*) The right acquired by a general lien is that of an implied pledge (*Brandao* v. *Barnett* (1846), 3 C. B. 519, *per* Lord CAMPBELL, at p. 531; compare *Jeffryes* v. *Agra and Masterman's Bank* (1866), L. R. 2 Eq. 674; and see title BANKERS AND BANKING, Vol. I., pp. 620 *et seq.*

Where a banker before collecting a bill or cheque for his customer credits the customer's account, the banker becomes a holder for value whatever the state of the customer's account (*M'Lean* v. *Clydesdale Bank* (1883), 9 App. Cas. 95).

Where, after an action by the drawer of a bill against a party to whom he handed it to be discounted for the recovery of the bill, the bill was recovered and was in the possession of the drawer's solicitor, the latter had no power to sue the acceptor on the instrument with a view to satisfying out of the proceeds his bill of costs against the drawer (*Redfern* v. *Rosenthal* (1902), 86 L. T. 855).

(*q*) See *Ex parte Schofield, Re Firth* (1879), 12 Ch. D. 337; *Dawson* v. *Isle*, [1906] 1 Ch. 633. A special lien may be created by the deposit of the bills etc. with a banker (*Re Bowes* (1886), 33 Ch. D. 586). But in general the presumption is that, when a bill is transferred to a banker, he takes it as a holder, not as a bailee or depositary (*Re Boys, Ex parte Hop Planters' Co.* (1870), L. R. 10 Eq. 467).

(*r*) *Jones* v. *Peppercorne* (1858), 28 L. J. (CH.) 158. See title STOCK EXCHANGE.

(*s*) Bills of Exchange Act, 1882 (45 & 46 Vict. c. 61), s. 30; *Hall* v. *Featherstone* (1858), 3 H. & N. 284, citing *Harvey* v. *Towers* (1851), 6 Exch. 656; *Smith* v. *Braine* (1851), 16 Q. B. 244; *Fuller* v. *Alexander* (1882), 52 L. J. (Q. B.) 103; *Tatam* v. *Haslar* (1889), 23 Q. B. D. 345; *Jones* v. *Gordon* (1877), 2 App. Cas. 616, *per* Lord BLACKBURN, at p. 627. When the burden of proof is shifted, it seems that the plaintiff must give evidence as to both value and good faith (*Tatam* v. *Haslar, supra*), but see the qualifications suggested in Byles on Bills, 16th ed. pp. 145—147.

SECT. 9. Consideration.

Fraud.

847. Fraud vitiates every contract into which it enters, and an instrument, the consideration for which is fraudulent even in part, is voidable at the option of the party defrauded except against a holder in due course (*t*).

When the fraud is at the expense not of one of the immediate parties, but of persons who are strangers to the contract altogether, the effect is the same (*u*).

Fraud may consist in negotiating the instrument in breach of faith, as when a bill is indorsed to a party for the special purpose of having it discounted by him, and the latter instead of doing so negotiates it to another person (*w*).

Duress.

848. So, too, duress (*x*), or taking an undue advantage of a party (as when he is intoxicated), is a ground for denying the consideration for an instrument and rendering it voidable (*a*).

In all such cases, where the consideration is clearly fraudulent and the instrument is in the hands of a party with notice, the court may order it to be given up at once. When only a *primâ facie* case of fraud is made out, the court may restrain the negotiation of an instrument for a specified time in order that the question may be tried (*b*).

Illegality.

849. If the consideration is illegal either wholly or in part (*c*), the instrument cannot be recovered on except by a holder in due course (*d*). The illegality may consist either in its being against the general principle of the common law or in its special prohibition or interdiction by statute.

(*t*) *Jones* v. *Gordon* (1877), 2 App. Cas. 616; *Watson* v. *Russell* (1864), 5 B. & S. 968; compare *Dawes* v. *Harness* (1875), L. R. 10 C. P. 166. So, too, in *Solomon* v. *Turner* (1815), 1 Stark. 51, where the defendant had bought some pictures and given a note in payment therefor. An action was brought on the note, and the defendant was about to offer evidence of the inadequacy of the consideration in order to reduce the damages, when Lord ELLENBOROUGH, C.J., said (at p. 52): "I will not admit the evidence for the purpose of reducing the damages, by showing that the pictures were of an inferior value, but if you can, by the inadequacy of the value and other circumstances, prove fraud on the part of the plaintiff so as to show that there was no contract at all, the evidence will be admissible; if it fall short of that it will be unavailable." See also *Lewis* v. *Cosgrave* (1809), 2 Taunt. 2. As to fraud generally, see title MISREPRESENTATION AND FRAUD.

(*u*) *E.g.*, where a debtor gives a bill or note to one of his creditors in fraudulent preference of the rest (*Cockshott* v. *Bennett* (1788), 2 Term Rep. 763; *Knight* v. *Hunt* (1829), 5 Bing. 432; *Howden* v. *Haigh* (1840), 11 Ad. & El. 1033; *Atkinson* v. *Denby* (1861), 30 L. J. (EX.) 361). Similarly where a note or bill is given to one creditor for better security (*Leicester* v. *Rose* (1803), 4 East, 372).

(*w*) Compare *Lloyd* v. *Howard* (1850), 15 Q. B. 995; *Barber* v. *Richards* (1851), 6 Exch. 63. See Bills of Exchange Act, 1882 (45 & 46 Vict. c. 61), s. 21 (2).

(*x*) Or "force and fear," the equivalent in Scottish law of "duress." See title CONTRACT.

(*a*) *Kearns* v. *Durell* (1848), 6 C. B. 596; *Gore* v. *Gibson* (1845), 13 M. & W. 623.

(*b*) Chalmers, Bills of Exchange, 6th ed. p. 100. See *Jones* v. *Lane* (1839), 3 Y. & C. (EX.) 281.

(*c*) The legality of the consideration for a cheque in England given abroad must be determined according to English law (*Moulis* v. *Owen*, [1907] 1 K. B. 746).

(*d*) If the evidence shows that there was an illegal consideration given for the instrument, the onus of proof is on the holder to show that he is a holder in due course (*Bailey* v. *Bidwell* (1844), 13 M. & W. 73).

SECT. 9. Consideration.

Common law illegality obtains wherever the consideration is founded upon a transaction which is against sound morals, public policy, public rights, or public interests (*e*).

Common law illegality.

Of statutes which made the consideration given for negotiable instruments illegal, instances formerly existed in the usury and stockjobbing laws. At the present day an instance remains in the Gaming Acts (*f*), under which all bills, notes etc. the whole or any part of the consideration for which was money or any valuable thing won at certain games, or by betting on such games, or for reimbursing or repaying any money knowingly lent or advanced for such gaming or betting, are void in the hands of a holder who has notice of the consideration, but can be recovered on by a holder in due course (*g*).

Statutory illegality.

Null and void transactions.

850. Not only may the consideration for a negotiable instrument be expressly made illegal by statute or in fact be illegal owing to the transaction in respect of which the instrument is given being tainted with illegality, but there may in fact be a failure of consideration between the immediate parties owing to the transaction in respect of which the instrument is given being null and void (*h*). In such cases, the transaction not being prohibited but only null and void, an instrument given in respect of it cannot be enforced as between the immediate parties, but is valid in the hands of a holder for value (*i*).

(*e*) *Willison* v. *Patteson* (1817), 7 Taunt. 438 (alien enemy); *Lowe* v. *Peers* (1768), 4 Burr. 2225 (restraint of marriage); *Flower* v. *Sadler* (1882), 10 Q. B. D. 572; *Jones* v. *Merionethshire Permanent Benefit Building Society*, [1892] 1 Ch. 173 (stifling prosecution). See further title CONTRACT, and Story, Bills of Exchange, 6th ed. s. 186.

(*f*) Stat. 16 Car. 2,c. 7; Gaming Act, 1710 (9 Anne, c. 19), which specifically mentions cards, dice, tables, tennis, and bowls, but extends to any other games whatsoever (*ibid.*, s. 1); Gaming Act, 1738 (12 Geo. 2, c. 28) (ace of hearts, pharaoh, basset, or hazard); Gaming Act, 1739 (13 Geo. 2, c. 19) (passage and all other games played with dice, except backgammon); Gaming Act, 1744 (18 Geo. 2, c. 34) (roulet); Gaming Act, 1835 (5 & 6 Will. 4, c. 41), which extends to horse racing (*Hay* v. *Ayling* (1851), 16 Q. B. 423); Gaming Act, 1845 (8 & 9 Vict. c. 109); Gaming Act, 1892 (55 & 56 Vict. c. 9). See further, title GAMING AND WAGERING.

(*g*) *Hay* v. *Ayling*, *supra*, *per* Lord CAMPBELL, C.J., at p. 431. Where the defendant lost money to a person on bets made on a horse race and drew a cheque for his losses in favour of that person, the plaintiff to whom the cheque was indorsed, and who took the cheque with notice of the consideration, could not recover thereon (*Woolf* v. *Hamilton*, [1898] 2 Q. B. 337). See also *Moulis* v. *Owen*, [1907] 1 K. B. 746.

But although money knowingly lent or advanced for gaming or betting cannot be recovered on the ground that the consideration is illegal, money lent to enable the borrower to pay betting debts already incurred is in a different category, and it has been held in such a case where the borrower became bankrupt that the lender who had been given two promissory notes to secure the debt could prove in the bankruptcy (*Ex parte Pyke*, *Re Lister* (1878), 8 Ch. D. 754). See title GAMING AND WAGERING.

(*h*) By the Gaming Act, 1845 (8 & 9 Vict. c. 109), s. 18, all contracts or agreements, whether by parol or in writing, by way of gaming or wagering are null and void, and by the Gaming Act, 1892 (55 & 56 Vict. c. 9), s. 1, any promise to repay sums paid under such contracts or agreements is null and void also.

(*i*) Thus when the defendant gives a note for losses on the Stock Exchange, and the payee indorses it to a party who takes it for value, but with knowledge

SECT. 9. Consideration.

SUB-SECT. 5.—*Accommodation Bills.*

Accommodation party.

851. An accommodation party (*k*) to a bill is a person who has signed a bill as drawer, acceptor, or indorser, without receiving value therefor, and for the purpose of lending his name to some other person, who may or may not himself be a party to the bill (*l*).

Any person who thus signs a bill is liable thereon to a holder for value, whether the latter knew when he took the bill that such person was an accommodation party or not (*m*).

Relationship of parties.

The intention of the parties in immediate relationship where one of them has signed for the accommodation of the other, is that that other should be at liberty to raise money by the negotiation of the bill, but should provide funds to meet the bill if called on at maturity. The relation is one of principal and surety (*n*).

Accommodation bill.

Though an accommodation party may sign in any capacity the bill will, properly speaking, only be an accommodation bill when the accommodation party signs as acceptor thereof (*o*).

Where there is a fluctuating balance between the parties the bill is not to be deemed an accommodation bill, even if at the moment of drawing, acceptance, or payment the balance may be in favour of the acceptor (*p*).

SECT. 10.—*Transfer.*

SUB-SECT. 1.—*Transfer by Negotiation.*

Negotiation.

852. An instrument is said to be negotiated (*q*) when it is transferred from one person to another in such a manner as to constitute the transferee the holder thereof (*a*). Every instrument the transfer of which is not expressly prohibited by words appearing on its face (*b*) may be negotiated, but the mode of negotiation or transfer is not uniform.

of the transaction, that party can recover (*Lilley* v. *Rankin* (1886), 56 L. J. (Q. B.) 248). See also *Fitch* v. *Jones* (1855), 24 L. J. (Q. B.) 293, *per* ERLE, J., at p. 296; "The main point here is whether this note is brought within the category of notes tainted with illegality in their inception by showing that it was given in payment of a wager on the hop duty. I am of opinion that it is not so tainted. A party without violating the common law may make such a wager and may pay the money if he lose it; and if instead of paying the bet he gives a note promising to pay at a future date, he still violates no statute." Compare *Moulis* v. *Owen*, [1907] 1 K. B. 746. As to who are immediate parties, see *Robinson* v. *Reynolds* (1841), 2 Q. B. 196.

(*k*) Bills of Exchange Act, 1882 (45 & 46 Vict. c. 61), s. 28 (1).

(*l*) *Oriental Financial Corporation* v. *Overend, Gurney & Co.* (1871), 7 Ch. App. 142.

(*m*) Bills of Exchange Act, 1882 (45 & 46 Vict. c. 61), s. 28 (2).

(*n*) See title GUARANTEE.

(*o*) *Scott* v. *Lifford* (1808), 1 Camp. 246.

(*p*) *Re Overend, Gurney & Co., Ex parte Swan* (1868), L. R. 6 Eq. at p. 344. Compare *Re London, Bombay and Mediterranean Bank* (1874), 43 L. J. (CH.) 683.

(*q*) For the meaning of negotiation, see p. 463, *ante*.

(*a*) Bills of Exchange Act, 1882 (45 & 46 Vict. c. 61), s. 31 (1).

(*b*) See p. 479, *ante*. When in spite of such words a bill is indorsed, the indorser is liable to the indorsee on his indorsement, for he is virtually the drawer of a new bill (*aliter*, however, if the instrument is a note); see *Gwinnell* v. *Herbert* (1836), 6 Nev. & M. (K. B.) 723; *Plimley* v. *Westley* (1835), 2 Bing. (N. C.) 249.

When payable to bearer—whether payable simply to bearer or to A. B. or bearer—it is negotiated by delivery (*c*).

When payable to order—whether payable simply to A. B., or to A. B.'s order, or to A. B. or order—it is negotiated by the indorsement of the holder completed by delivery (*d*).

Transfer of order bill without indorsement.

853. Where the holder of a bill payable to order transfers it for value without indorsing it, the transfer gives the transferee such title as the transferor had in the bill and the transferee in addition acquires the right to have the indorsement of the transferor (*e*). In such a case the date when the instrument is indorsed is deemed to be the true date of negotiation (*f*); and until the indorsement takes place the position of the transferee is no better than that of the assignee of an ordinary chose in action (*g*). He is affected by any notice of fraud received by him prior to the indorsement (*h*). He cannot sue on the instrument except in the name of the transferor (*i*), and he cannot negotiate it to another party (*k*). If he writes on the bill the name of the transferor, it is an unauthorised signature and, as such, wholly inoperative (*l*).

Transfer by indorsement.

854. In order to operate as a negotiation the indorsement must be written on the bill itself (*m*) and be signed by the

(*c*) Bills of Exchange Act, 1882 (45 & 46 Vict. c. 61), s. 31 (2).

(*d*) *Ibid.*, s. 31 (3). See also definition of "indorsement," *ibid.*, s. 2 (p. 463, *ante*). The term holder includes payee (*Lloyd's Bank, Ltd.* v. *Cooke*, [1907] 1 K. B. 794, *per* MOULTON, L.J., at p. 807). The delivery may be actual or constructive, see p. 463, *ante*.

(*e*) Bills of Exchange Act, 1882 (45 & 46 Vict. c. 61), s. 31 (4); *Walters* v. *Neary* (1904), 21 T. L. R. 147. The right to have the instrument indorsed may be enforced by action (see *Rose* v. *Sims* (1830), 1 B. & Ad. 521); and if the transferor is dead or bankrupt, his executor or trustee respectively will be compelled to indorse (*Watkins* v. *Maule* (1820), 2 Jac. & W. 237; *Ex parte Mowbray, Re Everest* (1820), 1 Jac. & W. 428). If the transferee return the bill to the transferor for indorsement and the latter loses or destroys the bill, the transferee has no remedy on the bill against the acceptor but only against the transferor (*Edge* v. *Bumford* (1862), 31 L. J. (CH.) 805).

(*f*) *Whistler* v. *Forster* (1863), 14 C. B. (N. S.) 248.

(*g*) For the rights of such an assignee, see title CHOSES IN ACTION.

(*h*) *Whistler* v. *Forster*, *supra*, at p. 257, where WILLES, J., says: "The general rule of law is undoubted, that no one can transfer a better title than he himself possesses. *Nemo dat quod non habet.* To this there are some exceptions, one of which arises out of the rule of the law-merchant as to negotiable instruments. These, being part of the currency, are subject to the same rule as money; and if such an instrument be transferred in good faith, for value, before it is overdue, it becomes available in the hands of the holder, notwithstanding fraud which would have rendered it unavailable in the hands of a previous holder. This rule, however, is only intended to favour transfers in the ordinary and usual manner whereby a title is acquired according to the law-merchant, and not to (*sic*) a transfer which is valid in equity according to the doctrine respecting the assignment of choses in action, and it is therefore clear, that, in order to acquire the benefit of this rule, the holder of the bill must, if it be payable to order, obtain an indorsement, and that he is affected by notice of a fraud received before he does so."

(*i*) *Harrop* v. *Fisher* (1861), 10 C. B. (N. S.) 196.

(*k*) *Ibid.*

(*l*) *Ibid.*; and see Bills of Exchange Act, 1882 (45 & 46 Vict. c. 61), ss. 24, 32 (1).

(*m*) Bills of Exchange Act, 1882 (45 & 46 Vict. c. 61), s. 32 (1); and see p. 463, *ante*. The important thing is that the indorsement should appear on the bill

SECT. 10. Transfer.

indorser (*n*). The simple signature of the indorser on the bill without additional words is sufficient (*o*). When written on an allonge (*p*), or on a copy of the bill issued or negotiated in a country where copies are recognised, it is deemed to be written on the bill itself. Notwithstanding the primary meaning of the term a signature on the face of a bill may be a valid indorsement (*q*).

Partial indorsement.

855. The indorsement must be an indorsement of the entire instrument. A partial indorsement, that is to say an indorsement which purports to transfer to the indorsee a part only of the amount payable, or which purports to transfer the bill to two or more indorsees severally, does not operate as a negotiation of the instrument (*r*), but may authorise the indorsee to receive payment of the amount specified.

Indorsement by one of several payees.

An instrument which is payable to two or more payees or indorsees may be indorsed by one of them if they are partners in a trading firm or if he has authority to indorse for them all. Otherwise they must all indorse it (*s*).

Wrong designation.

Where in an indorsement on an instrument the indorsee is

itself. An assignment in writing, but not on the instrument itself, is not an indorsement (*Re Barrington* (1804), 2 Sch. & Lef. 112). "But it is proved that according to a well-established usage it is the common and almost invariable practice of bill-brokers in the City of London not to go through the form of putting their names upon every bill which they re-discount with their bankers, but to give instead a general indemnity or guarantee to their bankers, by which they undertake to be liable to the bankers upon each bill which they re-discount with them just as if they had indorsed that bill. . . . I am aware of no authority and I can see no principle for holding that the liability [*inter partes*] which is created by such a guarantee differs from that which is created by the indorsement of a bill of exchange" (*Ex parte Bishop, Re Fox, Walker & Co.* (1880), 15 Ch. D. 400, *per* JAMES, L.J., at p. 414).

(*n*) As to the persons included in the term "indorser," see p. 520, *post*.

(*o*) Bills of Exchange Act, 1882 (45 & 46 Vict. c. 61), s. 32 (1). Although additional words are unnecessary, they are not harmful so long as they do not conflict with the presumed intention to indorse. Where the holder writes at the back of an instrument "I bequeath . . . pay the within contents to . . . or his order at my death," and gives it to the person named, the writing is not an indorsement, but a testamentary gift void for want of witnesses (*Re Patterson* (1864), 33 L. J. (CH.) 596). But it is not uncommon, and in some countries, *e.g.*, France (see *Hirschfeld* v. *Smith* (1866), L. R. 1 C. P. 340), it is obligatory, that the indorsement should recite the consideration given. For forms of indorsement, see Encyclopædia of Forms and Precedents, Vol. II., p. 513.

(*p*) Bills of Exchange Act, 1882 (45 & 46 Vict. c. 61), s. 32 (1). An allonge is a slip which may be attached to the bill and used in the event of the indorsements being numerous or lengthy enough to occupy the whole available space on the back of the bill itself. Precautions should, and in some countries must, be taken to avoid fraud by making the last writing on the bill and the first on the allonge part of the same indorsement.

(*q*) *Ex parte Yates, Re Smith* (1857), 27 L. J. (BCY.) 9.

(*r*) Bills of Exchange Act, 1882 (45 & 46 Vict. c. 61), s. 32 (2); *Heilbut* v. *Nevill* (1869), L. R. 4 C. P., *per* WILLES, J., at p. 358. Although an indorsement must not transfer the bill to two or more indorsees severally, it may do so alternatively (Bills of Exchange Act, 1882 (45 & 46 Vict. c. 61), s. 7 (2), as to alternative payees, made applicable to indorsees by s. 34 (3)). See *Absolon* v. *Marks* (1847), 17 L. J. (Q. B.) 7; *Watson* v. *Evans* (1863), 32 L. J. (EX.) 137.

(*s*) Bills of Exchange Act, 1882 (45 & 46 Vict. c. 61), s. 32 (3); *Carvick* v. *Vickery* (1783), 2 Doug. (K. B.) 653. The usage in the case of dividend warrants payable to two or more persons is to accept the indorsement of one of them, and this usage is expressly preserved by the Act of 1882, s. 97 (3) (d).

wrongly designated or his name mis-spelt, he may indorse the instrument as therein described, adding, if he think fit, his proper signature (*t*).

Order of indorsements

Where there are two or more indorsements on an instrument, each indorsement is deemed to have been made in the order in which it appears on the instrument until the contrary is proved (*u*).

SUB-SECT. 2.—*Different Kinds of Indorsements.*

Kinds of indorsements.

856. The indorsement on an instrument may be either in blank or special (*a*). When it is in blank it consists merely of the signature of the indorser (*b*), *i.e.*, it specifies no indorsee; an instrument so indorsed becomes payable to bearer and may therefore be thenceforward negotiated by delivery (*c*). When it is special it specifies the person to whom, or to whose order, the instrument is to be payable (*d*); such a person is known as the indorsee, and he is in a position corresponding to that of the original payee (*e*).

Where an instrument has been indorsed in blank, any holder may convert the blank indorsement into a special indorsement by writing above the indorser's signature a direction to pay the instrument to or to the order of himself or some other person (*f*).

Conditional indorsements.

857. An indorsement may be conditional, but in that case the condition may be disregarded by the payer, and payment to the indorsee is valid whether the condition has been fulfilled or not (*g*). It would seem, however, that as between an indorser and his indorsee, the latter, if he took the instrument under a conditional indorsement, holds it or the proceeds thereof subject to the rights of the person indorsing conditionally.

Restrictive indorsements.

858. The indorsement may also contain terms making it restrictive (*h*).

(*t*) Bills of Exchange Act, 1882 (45 & 46 Vict. c. 61), s. 32 (4); *Leonard* v. *Wilson* (1834), 2 Cr. & M. 589; but see *Kirk* v. *Blurton* (1841), 9 M. & W. 284. When an indorsement is addressed to a married woman as "Mrs. John Smith," she should sign her name as "Emma Smith, wife of John Smith."

(*u*) Bills of Exchange Act, 1882 (45 & 46 Vict. c. 61), s. 32 (5); *Macdonald* v. *Whitfield* (1883), 8 App. Cas. 733.

(*a*) Bills of Exchange Act, 1882 (45 & 46 Vict. c. 61), s. 32 (6). For forms of indorsement see Encyclopædia of Forms, Vol. II., p. 513.

(*b*) Bills of Exchange Act, 1882 (45 & 46 Vict. c. 61), s. 34 (1).

(*c*) *Ibid.*, ss. 34 (1), 31 (2). See *Peacock* v. *Rhodes* (1781), 2 Doug. (K. B.) 633.

(*d*) Bills of Exchange Act, 1882 (45 & 46 Vict. c. 61), s. 34 (2). The special indorsement may be "to A. B.," "to the order of A. B.," or "to A. B. or order."

(*e*) *Ibid.*, s. 34 (3). For the position of the original payee, see ss. 7, 8, *ibid.*, and p. 472, *ante*.

(*f*) *Ibid.*, s. 34 (4). See *Hirschfeld* v. *Smith* (1866), L. R. 1 C. P. 340, *per* ERLE, C.J., at p. 353. Formerly the law was that if an instrument was once indorsed in blank it was ever after negotiable to bearer, though the indorser who indorsed specially was only liable through those to whom he indorsed (see *Walker* v. *Macdonald* (1848), 2 Exch. 527); but now the instrument is not payable to bearer, unless expressly made so, or unless the only or last indorsement is an indorsement in blank (Act of 1882, s. 8 (3)).

(*g*) Bills of Exchange Act, 1882 (45 & 46 Vict. c. 61), s. 33. Compare *Robertson* v. *Kensington* (1811), 4 Taunt. 30, as to the law before the Act.

(*h*) Bills of Exchange Act, 1882 (45 & 46 Vict. c. 61), s. 32 (6).

SECT. 10. Transfer.

In general what is meant by a restrictive indorsement is an indorsement which does one of the following three things (*i*) :—

(1) Prohibits the further negotiation of the bill (*k*).

(2) Constitutes the indorsee the agent of the indorser for a special purpose (*l*).

(3) Vests the title in the indorsee in trust for or to the use of some other person (*m*).

The effect of a restrictive indorsement is to confer upon the indorsee (*n*) :—

(1) The right to receive payment of the instrument.

(2) The same right of action against any other party to the instrument that his indorser had (*o*).

(3) The power, but only in accordance with the express terms of his authority, to transfer the instrument and his rights thereon to another (*p*).

Where further transfer is authorised, all subsequent indorsees take the instrument with the same rights and subject to the same liabilities as the first indorsee under the restrictive indorsement (*q*).

Negativing or extending liability.

859. The indorser may insert an express stipulation negativing or limiting his own liability to the holder (*r*), or on the other hand he may waive as regards himself some or all of the holder's duties (*s*).

In the special case of a person who is under obligation to indorse in a representative capacity, he may indorse the instrument in such terms as to negative personal responsibility (*t*). Such indorsements are more properly termed qualified indorsements.

SUB-SECT. 3.—*Duration of Negotiability.*

Duration of negotiability.

860. An instrument which is negotiable in its origin continues to be so until it has been either restrictively indorsed or discharged by payment or otherwise (*a*).

(*i*) Bills of Exchange Act, 1882 (45 & 46 Vict. c. 61), s. 35 (1).

(*k*) *E.g.*, where the indorsement is "pay to A. B. only."

(*l*) *Lloyd* v. *Sigourney* (1829), 5 Bing. 525; *Williams, Deacon & Co.* v. *Shadbolt* (1885), Cab. & El. 529.

(*m*) *Archer* v. *Bank of England* (1781), 2 Doug. (K. B.) 637.

(*n*) Bills of Exchange Act, 1882 (45 & 46 Vict. c. 61), s. 35 (2).

(*o*) *Evans* v. *Crambington* (1687), 2 Show. 509; but where a bill is restrictively indorsed for collection and the indorsee pays the amount to the indorser, he cannot acquire rights on the bill against the acceptor where the amount of the bill has been paid to the indorser before maturity, the indorsee for collection being an agent only (*Williams, Deacon & Co.* v. *Shadbolt, supra*).

(*p*) *Lloyd* v. *Sigourney, supra.*

(*q*) Bills of Exchange Act, 1882 (45 & 46 Vict. c. 61), s. 35 (3). See *Treuttel* v. *Barandon* (1817), 8 Taunt. 100.

(*r*) Bills of Exchange Act, 1882 (45 & 46 Vict. c. 61), s. 16 (1). See p. 479, *ante*. Thus he may indorse *sans recours* or may make other reservation as to his personal liability. Compare *Goupy* v. *Harden* (1816), 7 Taunt. 159; *Castrique* v. *Buttigieg* (1855), 10 Moo. P. C. C. 94. Compare the American phrase "at indorsee's own risk." See Byles on Bills, 16th ed. p. 181.

(*s*) Bills of Exchange Act, 1882 (45 & 46 Vict. c. 61), s. 16 (2), *e.g.*, as regards due presentment or notice of dishonour, as to which, see pp. 530 *et seq.*, 542 *et seq.*, *post*.

(*t*) *Ibid.*, s. 31 (5). See also s. 26 (1), and note (*l*), p. 495, *ante*.

(*a*) *Ibid.*, s. 36 (1); *Callow* v. *Lawrence* (1814), 3 M. & S. 95, *per* Lord ELLENBOROUGH, C.J., at p. 97: "A bill of exchange is negotiable *ad infinitum* until

The fact that it is overdue, or even that it has been dishonoured and an action brought upon it, is no bar to its further negotiation (*b*), but except where an indorsement bears date after the maturity of the instrument, every negotiation is *primâ facie* deemed to have been effected before it was overdue (*c*).

Overdue instrument.

861. Where an overdue instrument is negotiated, it can only be negotiated subject to any defect of title affecting it at its maturity, and thenceforward no person who takes it can acquire or give a better title than that of the person from whom he took it (*d*).

If, however, the person from whom the holder took it had at the time when the instrument matured a good title, the holder is not affected by a defect in the title of a previous holder (*e*).

Where an instrument, in its origin an accommodation bill, is negotiated after maturity, the mere absence of consideration is immaterial (*f*). But a negotiation in breach of an agreement expressed or implied that such a bill shall not be negotiated after maturity invalidates the holder's right to be a holder in due course (*g*).

it has been paid by or discharged on behalf of the acceptor." A restrictive indorsement in fact does not bar the negotiation of the bill, although it limits it. See p. 506, *ante*.

(*b*) Compare *Deuters* v. *Townsend* (1864), 33 L. J. (Q. B.) 301.

(*c*) Bills of Exchange Act, 1882 (45 & 46 Vict. c. 61), s. 36 (4). The negotiation of an instrument on the day of payment would therefore seem to be deemed to be before maturity.

(*d*) Bills of Exchange Act, 1882 (45 & 46 Vict. c. 61), s. 36 (2); *Redfern & Sons* v. *Rosenthal* (1902), 86 L. T. 855. As to defect of title, as a phrase, it is the modern statutory equivalent in this connection of an equity attaching to the bill; see *Tinson* v. *Francis* (1807), 1 Camp. 19; *Sturtevant* v. *Ford* (1842), 4 Man. & G. 101. Thus where a bill is indorsed by the drawer to a person to have it discounted, and that person, in fraud of the drawer, further indorses it when overdue to the plaintiff, the plaintiff cannot recover on the bill from the acceptor (*Lloyd* v. *Howard* (1850), 15 Q. B. 995). So where an overdue bill is purchased by an official with money stolen by him from the bank, and indorsed to another party, the claim of the bank constitutes an equity attaching to the bill which invalidates the title of the indorsee to recover thereon (*Re European Bank, Ex parte Oriental Commercial Bank* (1870), 5 Ch. App. 358). Similarly, where a bill is accepted subject to a condition expressly agreed on by the drawer and acceptor, and is indorsed when overdue to another party, that party is bound by the original condition (*Holmes* v. *Kidd* (1858), 28 L. J. (EX.) 112).

But where a bill drawn and accepted in England was indorsed in blank and delivered in Norway to the agent of an English firm, and having been seized in that country in execution of a judgment obtained there against a member of the English firm was subsequently sold after maturity to a holder who indorsed it to a holder in England, who took the bill without knowledge of his indorser's title, it was held that, as that indorser's title was good in Norway, the holder in England who took it from him could recover from the acceptor (*Alcock* v. *Smith*, [1892] 1 Ch. 238).

(*e*) *E.g.*, where a bill accepted for an illegal consideration is indorsed before it is due to a holder in due course, a party to whom the latter indorses it after maturity can recover on it (*Chalmers* v. *Lanion* (1808), 1 Camp. 383; *Fairclough* v. *Pavia* (1854), 9 Exch. 690). See Bills of Exchange Act, 1882 (45 & 46 Vict. c. 61), s. 29 (3), and p. 498, *ante*.

(*f*) *Sturtevant* v. *Ford* (1842), 4 Man. & G. 101; *Stein* v. *Yglesias* (1834), 1 Cr. M. & R. 565; *Charles* v. *Marsden* (1808), 1 Taunt. 224. As to defect of title, see note (*d*), *supra*.

(*g*) *Parr* v. *Jewell* (1855), 16 C. B. 684. As to an agreed set-off, see *Collenridge* v. *Farquharson* (1816), 1 Stark. 259; *Oulds* v. *Harrison* (1854), 10 Exch. 572, *per* PARKE, B., at p. 579.

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Where there is no defect in the title of the person from whom the holder took the overdue instrument, a set-off or other matter of counterclaim outstanding between that person and a prior party does not affect the holder's rights (*h*), even if its existence was known to the holder when he took the instrument (*i*).

Negotiation after dishonour.

862. Where a bill which is not overdue has been dishonoured, any person who takes it with notice of the dishonour, takes it subject to any defect of title attaching thereto at the time of dishonour (*k*). But a holder in due course *ex hypothesi* has no such notice, and there is no such defect in his title (*l*). Moreover, where a bill is dishonoured by non-acceptance and notice of dishonour is not given, the rights of a holder in due course subsequent to the omission are not prejudiced thereby (*m*).

"Not negotiable" cheque.

863. In the case of a cheque crossed "not negotiable," the person who takes it does not acquire and cannot give a better title to it than that of the person from whom he took it (*n*). The effect of adding the words "not negotiable" to a cheque is, therefore, not to impede transfer, but to perpetuate in the hands of any transferee whatever defect or infirmity of title may affect the person who first transferred the cheque with those words on it.

Negotiation back to prior party.

864. Where an instrument is negotiated back to a prior party (be he drawer, acceptor, or indorser), that party may, subject to the

(*h*) *Burrough* v. *Moss* (1830), 10 B. & C. 558; and see *Holmes* v. *Kidd* (1858), 28 L. J. (EX.) p. 112, *per* CROMPTON, J., at p. 113; *Oulds* v. *Harrison* (1854), 10 Exch. 572; *Re Overend, Gurney & Co., Ex parte Swan* (1868), L. R. 6 Eq. 344.

(*i*) *Whitehead* v. *Walker* (1842), 10 M. & W. 696.

(*k*) Bills of Exchange Act, 1882 (45 & 46 Vict. c. 61), s. 36 (5); *Hornby* v. *McLaren* (1908), 24 T. L. R. 494; *Crossley* v. *Ham* (1811), 13 East, 498, where an indorsee taking a bill with notice of its dishonour was held bound by an agreement made in regard to the bill by prior indorsers before its dishonour.

(*l*) Bills of Exchange Act, 1882 (45 & 46 Vict. c. 61), s. 36 (5).

(*m*) *Ibid.*, s. 48 (1).

(*n*) *Ibid.*, s. 81; *Fisher* v. *Roberts* (1890), 6 T. L. R. 354, where, two persons being partners, one of the partners in fraud of the other indorsed a cheque drawn in favour of the firm, crossed and marked "not negotiable" to the defendant, who gave cash for it; and in an action brought by the partner who was defrauded, it was held that the amount could be recovered. See, as to crossed cheques generally, title BANKERS AND BANKING, Vol. I. pp. 593 *et seq.*, 610 *et seq.*

In *Great Western Rail. Co.* v. *London and County Banking Co.*, [1901] A. C. 414, the object of the provision is defined by Lord BRAMPTON, at p. 422, as being "to afford to the drawer or the holder (s. 77) of a cheque who is desirous of transmitting it to another person as much protection as can reasonably be afforded to it against dishonesty or accidental miscarriage in the course of its transit"; and in the same case Lord HALSBURY, L.C., said (p. 418), "I think it is very important that every one should know that people who take a cheque, which is upon its face 'not negotiable' and treat it as a negotiable security must recognise the fact that if they do so they take the risk of the person for whom they negotiate it, having no title to it. . . . I do not understand what additional security is supposed to be given to a cheque by putting the words 'not negotiable' upon it, if the fact of its being negotiated can give a title to anyone. The supposed distinction between the title to the cheque itself and the title to the money obtained or represented by it seems to me to be absolutely illusory. The language of the statute . . . would be absolutely defeated by holding that a fraudulent holder of the cheque could give a title either to the cheque or to the money."

provisions in regard to discharge, re-issue and further negotiate it (*o*). He is not, however, entitled to enforce payment thereof against any intervening party to whom he was personally liable in his former capacity, though he may do so against persons to whom he was not so liable (*p*).

Striking out indorsements.

865. The holder (*q*) may at any time (*r*) strike out any indorsement which is not necessary to his title, with the result that he thereby frees the indorser whose indorsement is struck out, and all indorsers subsequent to him, from liability on the instrument (*s*).

And if an instrument is paid by an indorser, or being a bill payable to drawer's order is paid by the drawer, the payer, who is thereby remitted to his former rights as regards the acceptor or antecedent parties, may, at his discretion, strike out his own and subsequent indorsements and again negotiate it (*t*).

SUB-SECT. 4.—*Other Modes of Transfer.*

As chattels and choses in action.

866. Although bills and notes in their negotiable quality partake so largely of the nature of money, yet they retain also their innate character of chattels and choses in action. They will, therefore, pass as chattels under a will (*u*). As chattels they may be bought or sold (*a*). As choses in action they may be assigned (*b*). In all these cases the person taking them acquires the same title as that of the person from whom he took them (*c*).

(*o*) Bills of Exchange Act, 1882 (45 & 46 Vict. c. 61), s. 37. The discharge of a bill operates as a bar to its further negotiation (*ibid.*, s. 36 (i) (b)). In the case of an acceptor, his becoming the holder of it at or after its maturity operates *ipso facto* as a discharge. As to discharges generally, see *ibid.*, ss. 59—64, pp. 549 *et seq.*, *post*; and *Attenborough* v. *Mackenzie* (1856), 25 L. J. (EX.) 244.

(*p*) But if as payee or prior indorser he formerly indorsed "sans recours," he is able to sue the intervening parties, for the object of the rule is to prevent the possibility of actions which would nullify the effect of each other, and in the case supposed the intervening parties would have no right of action against him (*Wilkinson* v. *Unwin* (1881), 7 Q. B. D. 636; *J. W. Holmes & Co.* v. *Durkee* (1883), Cab. & El. 23; *Glenie* v. *Bruce Smith*, [1907] 2 K. B. 507, affirmed [1908] 1 K. B. 263).

(*q*) Or his agent duly authorised.

(*r*) Even at the trial (*Mayer* v. *Jadis* (1833), 1 Moo. & R. 247).

(*s*) Bills of Exchange Act, 1882 (45 & 46 Vict. c. 61), s. 63 (2); *Fairclough* v. *Pavia* (1854), 9 Exch. 690; but an indorser whose indorsement is struck out by mistake is not relieved (*Wilkinson* v. *Johnson* (1824), 3 B. & C. 428); and title may sometimes be made through a cancelled indorsement (*Fairclough* v. *Pavia*, *supra*, *per cur.* at p. 695).

(*t*) Bills of Exchange Act, 1882 (45 & 46 Vict. c. 61), s. 59 (2) (b).

(*u*) See titles EXECUTORS AND ADMINISTRATORS; WILLS.

(*a*) *I.e.*, when they are transferable by delivery. Compare *Fenn* v. *Harrison* (1790), 3 Term Rep. 757, *per* Lord KENYON, C.J., at p. 759; and see p. 521, *post*. This, the legal sense in which a bill is sold, is to be distinguished from the common commercial use of the phrase "sale of a bill," which in fact is not descriptive of the means of transfer but of the substance of the transaction. The ordinary meaning of "sale of a bill" in commerce is the drawing or transfer of a bill drawn upon some place abroad by a person in England who has an agent or correspondent in that place to another person having no such agent or correspondent and the payment by the latter of such a sum in English money as will buy the amount he requires to remit in the foreign currency at the current rate of exchange and pay the commission charged.

(*b*) *Re Barrington* (1804), 2 Sch. & Lef. 112.

(*c*) Compare Bills of Exchange Act, 1882 (45 & 46 Vict. c. 61), s. 31 (4), as

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Donatio mortis causâ.

Bills (*d*) and notes (*e*) may also pass by a *donatio mortis causâ*, *i.e.*, be delivered to the donee (*f*) as a gift from the donor, who is in expectation of imminent death, and who thereafter actually dies. So, too, cheques of a third party held by the donor will pass (*g*), but not cheques drawn by the donor (*h*), which are revocable by notice to the banker of the drawer's death (*i*).

Execution.

867. Though at common law negotiable instruments of all sorts and money itself were formerly immune from seizure in execution, they are alike made liable to seizure by the sheriff under a writ of *fieri facias* by the Judgments Act, 1838 (*k*), which also provides that an action may be brought on them in the name of the sheriff on his receiving an indemnity therefor.

They are also, since the County Courts Act, 1888 (*l*), liable to seizure by a bailiff or officer executing any process of execution issuing out of the county court, in which case the high bailiff is to hold them as a security for the amount directed to be levied by such execution or so much thereof as shall not be otherwise levied or raised for the benefit of the plaintiff, and the plaintiff may sue on them in the name of the defendant or in the name of any person in whose name the defendant might have sued.

Death.

868. By the ordinary operation of law the title to bills and notes passes at the death of the holder to his personal representatives, who can thereupon either sue on the instrument or indorse it to a

to transfer without indorsement. The transferee will be well advised to obtain the indorsement to him of the transferor. Should the instrument remain in the latter's possession after the sale or assignment, an indorsement by him, though later in date, to a holder who took it for value and without notice would give such holder a complete title to the instrument.

(*d*) Whether payable to bearer (*Miller* v. *Miller* (1735), 3 P. Wms. 356); or to order (*Rankin* v. *Weguelin* (1832), 27 Beav. 309; *Re Mead* (1880), 15 Ch. D. 651; *Clement* v. *Cheesman* (1884), 27 Ch. D. 631; and see *Re Beaumont*, [1902] 1 Ch. 889).

(*e*) *Veal* v. *Veal* (1859), 27 Beav. 303. It is doubtful whether a note made payable to the donee would entitle him to recover. But see *Re Whitaker* (1889), 42 Ch. D. 119.

(*f*) Delivery to an agent of the donee is sufficient (*Powell* v. *Hellicar* (1858), 26 Beav. 261).

(*g*) *Clement* v. *Cheesman* (1884), 27 Ch. D. 631.

(*h*) *Hewitt* v. *Kaye* (1868), L. R. 6 Eq. 198; *Re Beak* (1872), L. R. 13 Eq. 489; *Re Beaumont*, [1902] 1 Ch. 889. But the gift of a deposit note on the back of which there is a form of cheque filled up by the donor entitles the donee to the proceeds (*Re Dillon* (1890), 44 Ch. D. 76). A *donatio mortis causâ* is of course revocable by the donor until his death, and therefore is subject to debts if his estate is insufficient to satisfy them, and in any event to estate duty since the Finance Act, 1894 (57 & 58 Vict. c. 30). See titles EXECUTORS AND ADMINISTRATORS; GIFTS.

(*i*) Bills of Exchange Act, 1882 (45 & 46 Vict. c. 61), s. 75. See title BANKERS AND BANKING, Vol. I., p. 607.

(*k*) 1 & 2 Vict. c. 110, s. 12. The instruments named are cheques, bills of exchange, promissory notes, bonds, specialties or other securities for money. See title EXECUTION.

(*l*) 51 & 52 Vict. c. 43, ss. 147, 148, wherein the same instruments are named as in the Judgments Act, 1838, note (*k*), *supra*.

new holder as they think fit (*m*). In doing so it is open to them expressly to disclaim personal responsibility (*n*). Even where an instrument is specifically bequeathed to a legatee, the latter must obtain the indorsement of the testator's executor before attempting either to negotiate or to enforce it (*o*). SECT 10. Transfer.

869. So, too, in the event of the bankruptcy of the holder, the title to all bills, notes and cheques of which at the date of the bankruptcy he was the beneficial owner vests in his trustee without any form of transfer whatever (*p*), as also does any lien which he may have had upon any such instrument (*q*). But the title to instruments which he held merely in the capacity of agent does not vest in his trustee (*r*). Bankruptcy.

In the event of the bankruptcy of a person not the holder, the title to any such instrument in the possession, order or disposition of that person at the commencement of his bankruptcy by the consent and permission of the true owner under such circumstances that he is the reputed owner thereof does not vest in the trustee, unless they are in the nature of debts due or growing due to the bankrupt in the course of his trade or business (*s*).

So far as strangers are concerned who have had no notice of any available act of bankruptcy, an indorsement by the bankrupt to them, or a payment of the instrument by them to him is deemed valid if it takes place before the date of the receiving order (*t*). In the event of a bill being indorsed to a bankrupt before he obtains his discharge he may, unless his trustee intervenes, sue on it in his own name (*u*), and he may during bankruptcy indorse a bill accepted for his accommodation prior thereto (*a*).

SUB-SECT. 5.—*Effect of Crime upon Transfer.*

870. Bills and notes may be the subject of larceny, embezzlement or fraudulent misappropriation by agents (*b*). In the hands of a holder who takes an instrument with notice of the crime it cannot be sued on; but a valid title vests in a holder in due course who has taken it for value and without notice of the crime, so that Effect of crime on transfer.

(*m*) *Rawlinson* v. *Stone* (1746), 3 Wils. 1.
(*n*) Bills of Exchange Act, 1882 (45 & 46 Vict. c. 61), s. 31 (5).
(*o*) *Bishop* v. *Curtis* (1852), 21 L. J. (Q. B.) 391.
(*p*) Bankruptcy Act, 1883 (46 & 47 Vict. c. 52), s. 44. And see generally title BANKRUPTCY AND INSOLVENCY, *ante*.
(*q*) *Ex parte Buchanan, Re Kensington* (1812), 1 Rose, 280.
(*r*) Bankruptcy Act, 1883 (46 & 47 Vict. c. 52), s. 44.
(*s*) *Ibid.*, s. 44 (iii.). See *Ex parte Kemp, Re Fastnedge* (1874), 9 Ch. App. 383, *per* MELLISH, L.J., at p. 388.
(*t*) Bankruptcy Act, 1883 (46 & 47 Vict. c. 52), s. 49. This may be so even if the stranger has notice (*Hunt* v. *Fripp*, [1898] 1 Ch. 675).
(*u*) *Herbert* v. *Sayer* (1844), 5 Q. B. 965; approved in *Jameson* v. *Brick and Stone Co., Ltd.* (1878), 4 Q. B. D. 208; *Cohen* v. *Mitchell* (1890), 25 Q. B. D. 262. See also *Re Bennett, Ex parte Official Receiver*, [1907] 1 K. B. 149.
(*a*) *Willis* v. *Freeman* (1810), 12 East, 656.
(*b*) Larceny Act, 1861 (24 & 25 Vict. c. 96), ss. 1, 27, 68, 75. It is immaterial for the perpetration of the last-mentioned crime whether the instrument is complete or not (*R.* v. *Bowerman*, [1891] 1 Q. B. 112). See further, title CRIMINAL LAW AND PROCEDURE.

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no order can in such case be made for restitution on conviction of the offender, and no action can be maintained for the recovery of the instrument (*c*).

Forgery.

871. Where, however, the instrument is the subject of forgery the case is different, for a forged signature is wholly inoperative, and no right to retain the bill or to give a valid discharge therefor against any party thereto can be acquired through or under that signature unless the party against whom it is sought to retain the bill or enforce payment thereof is estopped from setting up the forgery as a defence (*d*).

Estoppel of party whose signature forged.

If a signature on the instrument has been forged and it comes to the knowledge of the party whose signature has been forged, that party may, if he does not give information of the forgery to the holder, be estopped from setting it up or relying upon it (*e*).

Genuine and forged signatures of same party.

Where the signature of a party to an instrument has been forged, the fact that the holder has subsequently obtained the genuine signature of that party does not restore validity to the instrument (*f*). An instrument on which it is proved that a forged signature has been placed may be ordered by the court to be delivered up (*g*).

A holder who on presenting an instrument has been paid in good faith and has received payment in good faith, but whose title is derived through a forged indorsement, may be compelled to return the money paid (*h*).

Instrument forged abroad.

Where an indorsement is forged abroad, and the instrument gets into the hands of a *bonâ fide* holder, the title of the holder must be determined according to the laws of the country where the instrument was transferred (*i*).

(*c*) Larceny Act, 1861 (24 & 25 Vict. c. 96), s. 100; *Chichester* v. *Hill* (1882), 52 L. J. (Q. B.) 160. And see *Moss* v. *Hancock*, [1899] 2 Q. B. 111.

(*d*) Bills of Exchange Act, 1882 (45 & 46 Vict. c. 61), s. 24. The acceptor, if he has once admitted the authenticity of his signature, cannot afterwards set up that it was forged (*Leach* v. *Buchanan* (1802), 4 Esp. 226, see p. 518, *post*; and he cannot deny to a holder in due course the existence of the drawer or the genuineness of the drawer's signature (Bills of Exchange Act, 1882 (45 & 46 Vict. c. 61), s. 54 (2) (a)). An indorser is estopped from denying to a holder in due course the genuineness and regularity in all respects of the drawer's signature and all previous indorsements (*ibid.*, s. 55 (2) (b)). See also pp. 495, *ante*, 520, *post*, and title ESTOPPEL. In the case of cheques, bankers are specially protected (Bills of Exchange Act, 1882 (45 & 46 Vict. c. 61), ss. 60, 80, 82, and the Bills of Exchange (Crossed Cheques) Act, 1906 (6 Edw. 7, c. 17)), as to which see title BANKERS AND BANKING, Vol. I., pp. 592 *et seq.* Where there is conflict of laws other considerations may arise; see *Embiricos* v. *Anglo-Austrian Bank*, [1905] 1 K. B. 677, and note (*d*), p. 562, *post*.

(*e*) *William Ewing & Co.* v. *Dominion Bank*, [1904] A. C. 806; but a reasonable time may be allowed. Compare *M'Kenzie* v. *British Linen Co.* (1881), 6 App. Cas. 82. But where a customer of a bank, whose signature was forged by one of the clerks of the bank, was requested by one of the agents of the bank to maintain silence in the interests of the bank, he was not estopped from relying on the forgery in an action against the bank (*Ogilvie* v. *West Australian Mortgage and Agency Corporation*, [1896] A. C. 257).

(*f*) *Esdaile* v. *La Nauze* (1835), 1 Y. & C. (EX.) 394.

(*g*) *Ibid.*

(*h*) *Imperial Bank of Canada* v. *Bank of Hamilton*, [1903] A. C. 49; and see *London and River Plate Bank* v. *Bank of Liverpool*, [1896] 1 Q. B. 7. See p. 550, *post*.

(*i*) *Embiricos* v. *Anglo-Austrian Bank*, [1905] 1 K. B. 667. See note (*d*), p. 562, *post*.

Where a paper bearing only a signature is stolen and then filled up and negotiated to a *bonâ fide* holder for value, the signer is not estopped from setting up the fraud (*j*). Theft.

SUB-SECT. 6.—*Rights of Transferee.*

872. It has been shown that both bills and notes partake of the nature of money in the readiness with which they may be transferred (*k*), and it follows, therefore, that it is the right of the holder to sue on the instrument in his own name (*l*). Rights of transferee.

He may either sue for himself or as agent or trustee for another party. In the second case he so far stands in the position of that other party that a defence or set-off which would have been good against that other party is equally good against him (*m*). Conversely, where he is sued personally, he cannot use in defence an instrument which he holds as agent or trustee for another (*n*). Right of action.

Where the instrument is payable to bearer the holder who has it in his actual or constructive possession may of course sue on it in his own name, or he may sue on it in the name of a principal provided that the latter ratifies his act, which ratification may take place even after an action has been begun (*o*).

873. A holder who could have maintained an action against any party to a bill or note can, in the event of the bankruptcy of that party, prove against his estate for the amount of his claim; and he can do so whether the instrument has reached maturity or not (*p*). Right of proof in bankruptcy.

(*j*) *Baxendale* v. *Bennett* (1878), 3 Q. B. D. 525; *Smith* v. *Prosser*, [1907] 2 K. B. 735.

(*k*) See p. 459, *ante*, and see *Crouch* v. *Credit Foncier of England* (1873), L. R. 8 Q. B. 374; also *Miller* v. *Race* (1758), 1 Burr. 452, 1 Smith, L. C. 11th ed. 463.

(*l*) Bills of Exchange Act, 1882 (45 & 46 Vict. c. 61), s. 38 (1). For definition of holder, see *ibid.*, s. 2, p. 463, *ante;* and see *Crouch* v. *Credit Foncier of England, supra.* Where the bill is made payable or indorsed to a specified person the action should be brought in that person's name (*Bawden* v. *Howell* (1841), 3 Man. & G. 638). The holder may or may not have ever had any interest in the bill (*Law* v. *Parnell* (1859), 7 C. B. (N. S.) 282), or, having had such interest, may have ceased to have any (*Poirier* v. *Morris* (1853), 2 E. & B. 89). But he cannot maintain an action against the real owner of the instrument (*Jones* v. *Broadhurst* (1850), 9 C. B. 173). Where the consideration for a bill payable to drawer's order is goods supplied to the drawee, and the drawer negotiates the bill to a third party, the drawer cannot sue the acceptor for the price of the goods, for he is not the holder of the bill, and recovery of the bill, before the action is actually tried, is insufficient to restore his title (*Davis* v. *Reilly*, [1898] 1 Q. B. 1).

(*m*) *De la Chaumette* v. *Bank of England* (1829), 9 B. & C. 208.

(*n*) *London, Bombay, and Mediterranean Bank* v. *Narraway* (1872), L. R. 15 Eq. 93; *Fair* v. *M'Iver* (1812), 16 East, 130, approved in *Forster* v. *Wilson* (1843), 12 M. & W. 191, *per* PARKE, B., at p. 204. See also *Lackington* v. *Combes* (1839), 6 Bing. (N. C.) 71.

(*o*) *Ancona* v. *Marks* (1862), 31 L. J. (EX.) 163; and see title AGENCY, Vol. I., pp. 173, 175.

(*p*) Bankruptcy Act, 1883 (46 & 47 Vict. c. 52), s. 37; *Wood* v. *De Mattos* (1865), L. R. 1 Exch. 91. See also *Re Morris*, [1899] 1 Ch. 485, as to bills being aggregated for proof in bankruptcy.

The rules that apply in bankruptcy to bills of exchange, promissory notes,

SECT. 10. Transfer.

Freedom from defect of title.

874. A holder who is a holder in due course holds the instrument free from any defect of title of prior parties as well as from mere personal defences available to prior parties *inter se*, and he may enforce payment against all parties liable thereon (*q*).

Alteration not apparent.

875. Where an alteration, even though material, has been made in an instrument, if it is not apparent, a holder in due course may avail himself of the instrument as if it had not been altered, and may enforce payment of it according to its original tenor (*r*).

Right to transfer and receive payment.

876. Even if the holder's title to an instrument is defective, a holder in due course to whom he negotiates it obtains a good and complete title thereto (*a*), and a payment made by any person in due course to the holder, whether his title is defective or not, operates for that person as a valid discharge for the instrument (*b*).

Where an instrument is transferred in a foreign country, and different parties claim it, the title of the transferee depends upon the law of the place of transfer (*c*).

SUB-SECT. 7.—*Loss of Instrument.*

Duplicate of lost bill.

877. Where an instrument has been lost before it is overdue, the person who was the holder thereof may apply to the drawer to give him another bill of the same tenor, giving security to the drawer, if required, to indemnify him against all persons whatever in case the bill alleged to have been lost is ever found again (*d*); and if the drawer refuses to comply with such application he may be compelled to do so (*e*). No provision is made for obtaining the signatures of the indorsers or acceptor on the duplicate.

and cheques are expressly saved by Bills of Exchange Act, 1882 (45 & 46 Vict. c. 61), s. 97 (1). As to such rules generally, see title BANKRUPTCY AND INSOLVENCY, pp. 205—208, *ante*.

(*q*) Bills of Exchange Act, 1882 (45 & 46 Vict. c. 61), s. 38 (2); for definition of holder in due course, see p. 464, *ante*. As to the presumption in his favour in regard to an incomplete instrument, see *ibid.*, ss. 12, 20, pp. 466, 484, *ante;* and in regard to valid delivery, see *ibid.*, s. 21 (2), p. 482, *ante*. As to freedom from defect of title in the case of a bill dishonoured before maturity, see *ibid.*, s. 36 (5), p. 508, *ante*. Where a previous holder of an instrument has renounced the liabilities of any party thereto before, at, or after maturity, the rights of a holder in due course who has received no notice of such renunciation are unaffected. See *ibid.*, s. 62 (2), p. 555, *post*.

(*r*) Bills of Exchange Act, 1882 (45 & 46 Vict. c. 61), s. 64 (1). See p. 552, *post*.

(*a*) Bills of Exchange Act, 1882 (45 & 46 Vict. c. 61), s. 38 (3); *Marston* v. *Allen* (1841), 8 M. & W. 494, *per* ALDERSON, B., at p. 504.

(*b*) *Ibid.*

(*c*) *Alcock* v. *Smith*, [1892] 1 Ch. 238; *Embiricos* v. *Anglo-Austrian Bank*, [1905] 1 K. B. 677; and see p. 563, *post*.

(*d*) Bills of Exchange Act, 1882 (45 & 46 Vict. c. 61), s. 69.

(*e*) *Ibid.*, s. 69. See *King* v. *Zimmerman* (1871), L. R. 6 C. P. 466, where in an action under the Common Law Procedure Act, 1854 (17 & 18 Vict. c. 125), s. 87, the provisions of which are similar to those of the Act of 1882, s. 70 (see note (*f*), p. 515, *post*), the plaintiff sued on a lost bill without offering to give an indemnity against the claims of other persons on the bill, and the court would only order that the loss of the bill should not be set up as a defence on the terms that the plaintiff paid the costs of the action up to the time that the order was made, besides giving a proper indemnity. Before the Common Law Procedure Act,

Action on lost bill.

878. The court or a judge in any action or proceeding upon an instrument may order that the loss thereof shall not be set up as a defence, provided that an indemnity is given to the satisfaction of the court or judge against the claim of any other person upon the instrument in question (*f*). Consequently the holder is thus enabled to recover as against the acceptor or indorsers on any instrument which is payable to a specified person or to order, and upon an instrument which passes by delivery (*g*), except against the claims of an innocent holder to whom the finder of such last-mentioned instrument transfers it.

Protest on copy.

879. If the instrument has been lost or destroyed or is wrongly detained from the person entitled to hold it, such person may cause protest to be made on a copy or written particulars thereof (*h*).

SECT. 11.—*Liabilities of Parties.*

SUB-SECT. 1.—*Acceptor of Bill.*

Acceptor primarily liable.

880. The party primarily liable on a bill of exchange is the acceptor.

Drawee not liable without accepting.

The acceptor is the person to whom the order to pay is addressed. He is on the face of the bill as drawn, the drawee; but as such he is not, apart from special contract, by English law, under any obligation to accept the bill (*i*). A drawee who does not accept is not, therefore, liable on the bill (*k*).

Except in Scotland.

881. In Scotland, however, when the drawee of a bill has in his hands funds available for the payment thereof, the bill operates as an assignment of the sum for which it is drawn in favour of the holder, from the time when the bill is presented to the drawee (*l*).

Banker.

And in England, in the case of a banker on whom a cheque is drawn by a customer, there is an implied contract between drawer and drawee that the latter, the banker, will honour the former's (*i.e.*, the customer's) cheques up to the amount of his credit (*m*).

1854, was passed an action could not have been maintained upon a lost bill or upon the consideration therefor (*Crowe* v. *Clay* (1854), 9 Exch. 604); and perhaps not upon a bill that had been destroyed (*ibid.*; and *contra*, *Wright* v. *Lord Maidstone* (1855), 24 L. J. (CH.) 623). But in the case of a non-negotiable note the defendant at common law could not rely for a defence upon its non-production (*Wain* v. *Bailey* (1839), 10 Ad. & El. 616).

(*f*) Bills of Exchange Act, 1882 (45 & 46 Vict. c. 61), s. 70. And see the Common Law Procedure Act, 1854 (17 & 18 Vict. c. 125), s. 87, which applies to all negotiable instruments.

(*g*) The holder can thus satisfy the Bankruptcy Rules, rr. 221, 233, which provide for the production of the instrument before proof or dividend; see title BANKRUPTCY AND INSOLVENCY, pp. 230, 239, *ante*.

An instrument which passes by delivery is one which is either in its origin payable to bearer or made so by being indorsed in blank (Bills of Exchange Act, 1882 (45 & 46 Vict. c. 61), ss. 31 (2), 34 (1)).

(*h*) *Ibid.*, s. 51 (8). But he is not discharged from the duty of giving notice of dishonour (*Thackray* v. *Blackett* (1812), 3 Camp. 164).

(*i*) See *Rowe* v. *Young* (1820), 2 Bli. 391.

(*k*) Bills of Exchange Act, 1882 (45 & 46 Vict. c. 61), s. 53 (1).

(*l*) *Ibid.*, s. 53 (2).

(*m*) *Re Agra and Masterman's Bank, Ex parte Wanz* (1866), 36 L. J. (CH.) 151;

SECT. 11. Liabilities of Parties.

But the banker is only liable on his contract with his customer, and is not liable to the payee or holder of the cheque (*n*).

The relations between a banker and his customer are those of debtor and creditor, and so long as the latter has a balance to his credit, the banker is his debtor (*o*). Moreover, the contract may be extended by an agreement to let the customer overdraw, and in that case the contract to honour his cheques extends to the limit of the amount of the agreed overdraft (*p*).

Branch banks.

But different branches of one bank are for this purpose, among others, to be regarded as separate banks, so that a customer having a credit with one branch is not entitled as of course to have his cheque honoured by another branch (*q*), although the bank may, at its discretion, apply funds of a customer which it holds at one branch in satisfaction of an overdraft of the same customer at another branch (*r*).

Subject to these considerations it is the duty of a banker to pay his customer's cheques when presented, and, unless otherwise directed, in the order of their presentment (*s*).

Termination of banker's authority.

But his authority and duty are terminated by:—(1) the customer's countermand of payment (*t*); (2) notice of the customer's death (*u*); (3) the fact that a receiving order in bankruptcy has

Pott v. *Clegg* (1847), 16 M. & W. 321. Should the bank fail to honour its customer's cheques when the customer has a balance to his credit, the customer can recover damages (*Rolin* v. *Steward* (1854), 14 C. B. 595). But the bank is excused, where it is placed in funds only just before the cheque is presented, and the true state of the customer's account cannot be ascertained at the time (*Whitaker* v. *Bank of England* (1835), 1 Cr. M. & R. 744; *Bransby* v. *East London Bank* (1866), 14 L. T. 403; *Forman* v. *Bank of England* (1902), 18 T. L. R. 339; and see title BANKERS AND BANKING, Vol. I., p. 605). Where a cheque is drawn by an executor as such, the bank on whom it is drawn is only justified in refusing payment where to the banker's knowledge a breach of trust is intended by the executor (*Gray* v. *Johnston* (1868), L. R. 3 H. L. 1; see title BANKERS AND BANKING, Vol. I., p. 606).

(*n*) See title BANKERS AND BANKING, Vol. I., p. 608.

(*o*) See title BANKERS AND BANKING, Vol. I., p. 584.

(*p*) The agreement may be express or implied (*Armfield* v. *London and Westminster Bank* (1883), Cab. & El. 170; *Ritchie* v. *Clydesdale Bank* (1886), 13 R. (Ct. of Sess.) 866). But it should be founded on a valid consideration (*Fleming* v. *Bank of New Zealand*, [1900] A. C. 577). In the absence of an agreement of any kind, a bank is under no obligation to let its customer overdraw (*Cumming* v. *Shand* (1860), 29 L. J. (EX.) 129). See title BANKERS AND BANKING, Vol. I., p. 630.

(*q*) *Woodland* v. *Fear* (1857), 26 L. J. (Q. B.) 202; *Prince* v. *Oriental Bank Corporation* (1878), 3 App. Cas. 325.

(*r*) *Garnett* v. *M'Kewan* (1872), L. R. 8 Exch. 10. See title BANKERS AND BANKING, Vol. I., p. 606.

(*s*) *Kilsby* v. *Williams* (1822), 5 B. & Ald. 815. For an instance of a bank being held liable to a member of a partnership for cashing a partnership cheque in violation of a contract only to cash cheques drawn in a certain form, see *Twibell* v. *London Suburban Bank*, [1869] W. N. 127.

(*t*) Bills of Exchange Act, 1882 (45 & 46 Vict. c. 61), s. 75 (1); *M'Lean* v. *Clydesdale Banking Co.* (1883), 9 App. Cas. 95. The banker is not bound to recognise an unauthenticated telegram as a sufficient countermand, though he may reasonably act upon it, at least to the extent of postponing payment of the cheque until further inquiry can be made (*Curtice* v. *London, City, and Midland Bank*, [1908] 1 K. B. 293, *per* COZENS-HARDY, M.R., at p. 298). As to what is meant by communication of countermand, see *ibid.*, and title CONTRACT.

(*u*) Bills of Exchange Act, 1882 (45 & 46 Vict. c. 61), s. 75 (2). Compare *Rogerson* v. *Ladbroke* (1822), 1 Bing. 93.

been made against the customer, or notice that the customer has committed an available act of bankruptcy (*a*).

Effect of non-acceptance.

882. In the case of a bill of exchange where the drawee declines to accept, the drawer must bear all the losses and expenses, as well by reason of the non-acceptance as of the non-payment (*b*). But when the drawee does accept, he undertakes that he will pay the bill according to the tenor of his acceptance (*c*).

Liability of acceptor.

883. In the case of every other bill the acceptor is and remains the party primarily liable on the bill whatever may happen to the other parties (*d*), and whether any of the other parties are discharged or not (*e*). Should an indorser have to pay the bill, the acceptor by the fact of his acceptance is liable to be called upon to indemnify him (*f*).

Liability on accommodation bills.

In the case of a bill drawn for the accommodation of another party, the actual position differs from that appearing on the face of the instrument. The acceptor is only surety for the party accommodated, so that he is entitled to be indemnified by him, and if a holder has recovered part of the amount due from the party accommodated, he can only recover the balance from the acceptor (*g*).

Estoppel of acceptor.

884. There are certain estoppels which bind the acceptor (*h*) in regard to a holder in due course (*i*). He cannot deny to him the existence of the drawer, the genuineness of his signature (*k*) and his capacity and authority to draw the bill (*l*).

If the instrument is payable to the order of the drawer, he cannot deny to a holder in due course the capacity of the drawer to indorse at the time of such indorsement (*m*), nor if the instrument is payable to the order of the third party can he deny the existence of such third party or his capacity to indorse at the time of such

(*a*) Bills of Exchange Act, 1882 (45 & 46 Vict. c. 61), s. 97 (1); Bankruptcy Act, 1883 (46 & 47 Vict. c. 52), ss. 9, 49, 168. See title BANKERS AND BANKING, Vol. I., p. 607.

(*b*) See Story, Bills of Exchange, 6th ed. s. 113.

(*c*) Bills of Exchange Act, 1882 (45 & 46 Vict. c. 61), s. 54 (1); *Smith* v. *Vertue* (1860), 30 L. J. (C. P.) 56. As to the tenor of the acceptance, see p. 487, *ante*.

(*d*) *Anderson* v. *Cleveland* (1769), 13 East, 430, n.

(*e*) See p. 554, *post*. Compare *Smith* v. *Knox* (1799), 3 Esp. 46.

(*f*) *Duncan, Fox & Co.* v. *North and South Wales Bank* (1880), 6 App. Cas. 1.

(*g*) *Cook* v. *Lister* (1863), 13 C. B. 543.

(*h*) Bills of Exchange Act, 1882 (45 & 46 Vict. c. 61), s. 54 (2).

(*i*) A holder in due course may, it seems, include the payee (*Lloyd's Bank, Ltd.* v. *Cooke*, [1907] 1 K. B. 794, *per* MOULTON, L.J., at p. 807). For "a holder" includes the payee (Bills of Exchange Act, 1882 (45 & 46 Vict. c. 61), s. 2), and every holder is *primâ facie* deemed to be a holder in due course (*ibid.*, s. 30 (2)).

(*k*) *Sanderson* v. *Collman* (1842), 4 Man. & G. 209; *Cooper* v. *Meyer* (1830), 10 B. & C. 468.

(*l*) Bills of Exchange Act, 1882 (45 & 46 Vict. c. 61), s. 54 (2) (a); *Hallifax* v. *Lyle* (1849), 3 Exch. 446.

(*m*) *Braithwaite* v. *Gardiner* (1846), 8 Q. B. 473; *Aspitel* v. *Bryan* (1864), 33 L. J. (Q. B.) 328.

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indorsement; but in neither case is he bound to admit the genuineness (*n*) or validity (*o*) of the indorsement (*p*).

Forged acceptances.

An acceptor who has admitted the authenticity of his signature cannot afterwards refuse to honour it on the ground that it is forged (*q*), but if he has paid a bill on which his signature as acceptor has been forged, he is not estopped from refusing to pay a similar bill on the ground that that is forged also (*r*).

SUB-SECT. 2.—*Drawer of Bill.*

Liability of drawer.

885. The drawer of a bill of exchange (*s*) undertakes that the bill will on due presentment be accepted and paid according to its tenor, and that if it be dishonoured he will compensate the holder or any indorser who is compelled to pay it, provided that the requisite proceedings on dishonour are duly taken (*t*).

Estoppel of drawer.

He is precluded from denying to a holder in due course the existence of the payee and his then capacity to indorse (*a*).

The drawer of a bill may insert in the bill a stipulation negativing or limiting his own liability to the holder or waiving as regards himself some or all of the holder's duties (*b*).

Cheques.

The drawer of a cheque gives an undertaking similar to that given by the drawer of a bill, save that he undertakes that on presentment it will be duly paid (not accepted), and if it is not paid the holder is referred for his remedy to the drawer (*c*).

The drawer of a crossed cheque which has come into the hands of the payee and has been paid by the banker on whom it is drawn to another banker (if crossed generally), or to the banker to whom it is crossed or to that banker's agent for collection, being also a banker (if crossed specially), is entitled to the same rights and is placed in the same position as if payment of the cheque had been made to the true owner, whether that is in fact the case or not (*d*).

(*n*) *Beeman* v. *Duck* (1843), 11 M. & W. 251.

(*o*) *Robinson* v. *Yarrow* (1817), 7 Taunt. 455.

(*p*) Bills of Exchange Act, 1882 (45 & 46 Vict. c. 61), s. 54 (2) (b), (c).

(*q*) *Leach* v. *Buchanan* (1802), 4 Esp. 226.

(*r*) *Morris* v. *Bethell* (1869), L. R. 5 C. P. 47.

(*s*) Except in the case of a bill drawn for the drawer's accommodation, as to which see p. 534, *post*.

(*t*) Bills of Exchange Act, 1882 (45 & 46 Vict. c. 61), s. 55 (1) (a). As to the requisite proceedings on dishonour, see *ibid.*, s. 48, pp. 529, 542, *post*; *Whitehead* v. *Walker* (1842), 9 M. & W. 506. If there is only a qualified acceptance and the holder refuses to take it, the drawer becomes primarily liable. If the drawer receives notice of a qualified acceptance and does not, within a reasonable time, dissent from the holder's taking it, he is deemed to have given his assent (see p. 488, *ante*). As to notice of dishonour in case of a bill accepted for accommodation of the drawer, see note (*k*), p. 548, *post*.

(*a*) Bills of Exchange Act, 1882 (45 & 46 Vict. c. 61), s. 55 (1) (b); *Collis* v. *Emett* (1790), 1 Hy. Bl. 313.

(*b*) Bills of Exchange Act, 1882 (45 & 46 Vict. c. 61), s. 16 (1), (2). See p. 479, *ante*.

(*c*) As to the rights of the drawer to have his cheques honoured by the drawee, his banker, see p. 515, *ante*; title BANKERS AND BANKING, Vol. I., pp. 602 *et seq.*

(*d*) Bills of Exchange Act, 1882 (45 & 46 Vict. c. 61), s. 80.

SUB-SECT. 3.—*Maker of Promissory Note.*

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886. The maker of a promissory note by making it undertakes that he will pay it according to its tenor (*e*), and is precluded from denying to a holder in due course the existence of the payee and his then capacity to indorse (*f*). Liability of maker.

SUB-SECT. 4.—*Indorser.*

887. The indorser of an instrument by indorsing it undertakes that on due presentment it shall be accepted if a bill, and paid according to its tenor (*g*), and that, should it be dishonoured, he will compensate the holder or a subsequent indorser who is compelled to pay it, provided that the requisite proceedings on dishonour are duly taken (*h*). But it is open to him, as it is to the drawer, to insert in the instrument special stipulations restricting or extending his liability (*i*). Liability of indorser.

In regard to his immediate indorsee the liability of an indorser arises out of the contract between them, which is founded not merely on the indorsement itself, but also upon the delivery to the indorsee and upon the intention with which the delivery was made and accepted, as proved by words spoken or written by the parties, and the circumstances, such as the usage of the place, and the course of dealing between the parties, under which the delivery takes place (*k*). Liability to indorsees.

In regard to the holder, the drawer and indorsers of any instrument are jointly and severally liable for its due payment and, in case of a bill, for its due acceptance also (*l*). Liability to holder.

(*e*) Bills of Exchange Act, 1882 (45 & 46 Vict. c. 61), s. 88 (1). So that where a person guarantees the payment of a note, a failure by the maker to pay it according to its tenor and effect when due will render him liable (*Walton* v. *Mascall* (1844), 13 M. & W. 452).

(*f*) Bills of Exchange Act, 1882 (45 & 46 Vict. c. 61), s. 88 (2); *Drayton* v. *Dale* (1823), 2 B. & C. 293. It has been doubted whether the payee of a note could be a holder in due course, and in the case of *Herdman* v. *Wheeler*, [1902] 1 K. B. 361, where the maker, intending to borrow £15 from one lender, signed a blank stamped paper, which that lender afterwards filled in for a larger amount and made payable to a second lender, fraudulently keeping the balance for himself, the second lender failed to recover from the maker on the ground that he was not a holder in due course. But in *Lloyd's Bank, Ltd.* v. *Cooke*, [1907] 1 K. B. 794, the Court of Appeal held that the payee may be a holder in due course, and that where a note was fraudulently filled in for a larger sum than was authorised by a joint maker, that joint maker was estopped from denying the validity of the note by the common law rules of estoppel and (*per* MOULTON, L.J., at p. 807, referring to the definition of holder (s. 2) and holder in due course (s. 30 (2)) probably by the Bills of Exchange Act, 1882 (45 & 46 Vict. c. 61) as well. See also *Brocklesby* v. *Temperance Permanent Building Society*, [1895] A. C. 173. As to whether estoppel could have been set up in *Herdman* v. *Wheeler*, *supra*, see *Lloyd's Bank, Ltd.* v. *Cooke*, *supra*, *per* COLLINS, M.R., at p. 803. See also cases cited note (*a*), p. 483, *ante*.

(*g*) *Quære*, whether its tenor means its tenor at the time of his indorsement or its original tenor. Compare Bills of Exchange Act, 1882 (45 & 46 Vict. c. 61), s. 64, as to alteration.

(*h*) *Ibid.*, s. 55 (2) (a). As to the requisite proceedings on dishonour, see *ibid.*, s. 48, pp. 529, 535, 542, *post*.

(*i*) See *ibid.*, s. 16, and p. 479, *ante*.

(*k*) *Castrique* v. *Buttigieg* (1855), 10 Moo. P. C. C. 94.

(*l*) See *Rouquette* v. *Overmann* (1875), L. R. 10 Q. B. 525.

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Rights of indorser.

The contract of the indorser is one of surety, and he is entitled as against the holder to have the benefit of any securities which the maker or acceptor of the instrument may have deposited with the holder to cover his liability. This is the case whether at the time of his indorsement he knew of the existence or deposit of these securities or not (*m*).

Estoppels of indorser.

888. An indorser is precluded from denying to a holder in due course the genuineness and regularity in all respects of the drawer's signature and all previous indorsements (*n*), and from denying to his immediate or a subsequent indorsee that the instrument was at the time of his indorsement a valid and subsisting instrument, and that he had then a good title to it (*o*).

Persons liable as indorsers.

889. Where a person signs an instrument otherwise than as a maker, drawer or acceptor, he incurs the liabilities of an indorser to a holder in due course (*p*). But if there is ambiguity as to the capacity in which a party signed an instrument, the whole facts and circumstances attendant upon the making, issue and transfer of the instrument may be legitimately referred to for the purpose of ascertaining the true relation of the parties to each other; and reasonable inferences, derived from these facts and circumstances are admitted to the effect of qualifying, altering or even inverting the relative liabilities which the law merchant would otherwise assign to them (*q*).

Accommodation bills.

This ambiguity as to the true relation of the parties arises very frequently in connection with accommodation bills. In the case of such a bill, the signature of a relation or friend of the acceptor for whose accommodation the bill is drawn, placed on the back of the bill, does not constitute the party who so signs an acceptor, but an indorser of the bill, and it is immaterial whether the drawer who advances money to the parties accommodated on the strength of their acceptance does so before or after the signature is placed on the back of the bill (*r*).

(*m*) *Duncan Fox & Co.* v. *North and South Wales Bank* (1880), 6 App. Cas. 1. As to the contract of surety in general, see title GUARANTEE.

(*n*) Bills of Exchange Act, 1882 (45 & 46 Vict. c. 61), s. 55 (2) (b); *MacGregor* v. *Rhodes* (1856), 6 E. & B. 266.

(*o*) Bills of Exchange Act, 1882 (45 & 46 Vict. c. 61), s. 55 (2) (c).

(*p*) *Ibid.*, s. 56.

(*q*) *Macdonald* v. *Whitfield* (1883), 8 App. Cas. 733, *per* Lord WATSON, at p. 745.

Where the directors of a company mutually agree to indorse instruments made by the company as co-sureties with one another and do in fact successively indorse them, their true relation *inter se* may be shown by evidence to be that of co-sureties and not indorsees in succession to one another (*Macdonald* v. *Whitfield*, *supra*); compare also *Glenie* v. *Smith*, [1908] 1 K. B. 263; *Wilkinson* v. *Unwin* (1881), 7 Q. B. D. 636.

(*r*) *Steele* v. *McKinlay* (1880), 5 App. Cas. 754. In this case McKinlay obtained a loan in favour of his two sons from a party who drew a bill of exchange on them with the view of advancing the money on the strength of their acceptances. The sons duly accepted the bill and McKinlay himself signed his name on the back of the bill before returning it to the lender. The acceptors became bankrupt, and in an action by the representatives of the lender against those of McKinlay,

SUB-SECT. 5.—*Transferor by Delivery.*

SECT. 11. Liabilities of Parties.

Warranties by transferor by delivery.

890. A transferor by delivery is not liable on the instrument, but when he negotiates it he warrants to his immediate transferee, if the latter is a holder for value, three distinct things in regard to it (*a*). First, he warrants that the instrument is what it purports to be, *e.g.*, that if it purports to be a foreign bill of exchange drawn at some place abroad, it is, in fact, a foreign and not an inland bill and was in fact drawn as it appears to be drawn (*b*). Secondly, he warrants that he has a right to transfer it. Thirdly, he warrants that at the time of transfer he is not aware of any fact which renders it valueless, *e.g.*, that he does not know that any of the signatures on it are forged or unauthorised (*c*), or that it has been altered in a material particular (*d*).

If the instrument is found not to correspond with the warranty, the transferee can recover the money paid for it, but he must act with reasonable diligence (*e*).

Extent of liability.

891. The liability on the warranties must be distinguished from a liability on the consideration. A transferor by delivery is in effect the vendor of an instrument precisely as he might be the vendor of any other chattel (*f*). Beyond the actual points in regard to it which he warrants he is in no way responsible for the value of what he sells. If, therefore, its value diminishes or even vanishes altogether, *e.g.*, through the bankruptcy of any of the parties to it, he is not bound to compensate the transferee for his consequent loss (*g*). Where, on the other hand, the instrument is transferred, not by way of sale, but in payment of a debt, the

both the lender and McKinlay being dead, it was held that the latter was liable as an indorser, not as an acceptor of the bill, and, *per* Lord WATSON (at p. 782), that it made no difference whether his signature was placed there before the money was lent or not. In *Jenkins & Sons* v. *Coomber*, [1898] 2 Q. B. 168, the plaintiffs had drawn a bill, payable to their order, on the defendant's son for his accommodation, on the understanding that the defendant should guarantee the payment of it. The defendant indorsed the bill, but did so before it bore the indorsement of the plaintiffs, the payees. It was held that he was neither an indorser in the ordinary course, nor an indorser within the terms of the Bills of Exchange Act, 1882 (45 & 46 Vict. c. 61), s. 56; also that he was not liable on the guarantee owing to the requirements of the Statute of Frauds not being complied with. But see this case distinguished in *Glenie* v. *Bruce Smith*, [1907] 2 K. B. 507 (affirmed [1908] 1 K. B. 263) as to a blank acceptance.

(*a*) Bills of Exchange Act, 1882 (45 & 46 Vict. c. 61), s. 58. The reason is that no person is liable on an instrument in any capacity who has not signed it as such (*ibid.*, s. 23). As to holder for value, see *ibid.*, s. 27 (2), and p. 498, *ante*.

(*b*) *Gompertz* v. *Bartlett* (1853), 2 E. & B. 849.

(*c*) *Gurney* v. *Womersley* (1854), 4 E. & B. 133.

(*d*) *Leeds and County Bank* v. *Walker* (1883), 11 Q. B. D. 84.

(*e*) *Pooley* v. *Brown* (1862), 31 L. J. (C. P.) 134.

(*f*) Compare *Sard* v. *Rhodes* (1836), 1 M. & W. 153.

(*g*) *Fydell* v. *Clark* (1796), 1 Esp. 447, *per* Lord KENYON, C.J., at p. 448: "If . . . he took the bills or notes he must be bound by it. The bankers parted with them supposing them to be good and he took them under the same impression. Having taken them without indorsement he has taken the risk on himself. They were the holders of the bills and by not indorsing them have refused to pledge their credit to their validity, and [the plaintiff] must be taken to have received them on their own credit only."

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transferor is liable on the consideration unless the instrument was taken in absolute satisfaction of the debt (*h*).

If, however, the transferor, on negotiating an instrument which passes by delivery, indorses it, he makes himself liable as an indorser (*i*).

SUB-SECT. 6.—*Accommodation Party.*

Accommodation party.

892. Where the instrument is an accommodation bill (*k*), it is the duty of the party for whose accommodation it was drawn to provide funds to meet the bill at maturity (*l*), or in default of that to indemnify the acceptor or any other party who has been compelled to pay the holder (*m*). The indemnity to be given may be extended to include the costs of an action fought unsuccessfully against the holder, if there was a *primâ facie* ground of defence (*n*).

Liability to indemnify.

The right to an indemnity may be enforced by an action, but in such an action the plaintiff must show not merely that the money paid *pro tanto* discharges the liability of the defendant to the holder of the instrument, but also that it was paid at the request, express or implied, of the defendant. If the situation is such that he might be compelled by law to pay the money a request to pay will be implied. But a mere voluntary payment made with full knowledge that payment was not compellable is no ground for an indemnity (*o*).

Effect of bankruptcy.

In the case of the bankruptcy of the drawer there cannot be a double proof against his estate, namely, one proof by the holder of the bill, and the other proof by the acceptor on the contract of indemnity (*p*).

(*h*) *Camidge* v. *Allenby* (1827), 6 B. & C. 373; *Guardians of the Poor of Lichfield Union* v. *Greene* (1857), 26 L. J. (EX.) 140.

(*i*) *Fairclough* v. *Pavia* (1854), 9 Exch. 690.

(*k*) See p. 502, *ante*.

(*l*) See *Sleigh* v. *Sleigh* (1850), 5 Exch. 514. The acceptor is entitled to retain funds provided for this purpose, even although after providing the funds and before maturity of the instrument the party accommodated becomes bankrupt (*Yates* v. *Hoppe* (1850), 19 L. J. (C. P.) 180).

(*m*) This carries with it the right to benefit from securities belonging to the party accommodated in the hands of the holder (*Bechervaise* v. *Lewis* (1872), L. R. 7 C. P. 372; compare *Duncan, Fox & Co.* v. *North and South Wales Bank* (1880), 6 App. Cas. 1.

(*n*) *Bagnall* v. *Andrews* (1830), 7 Bing. 217, *per* TINDAL, C.J., at p. 222; *Stratton* v. *Mathews* (1848), 3 Exch. 48. *Aliter*, if there is no *primâ facie* defence (*Beech* v. *Jones* (1848), 5 C. B. 696), though the indemnity will certainly cover costs where there is any evidence of a request on the part of the party accommodated to defend (*Garrard* v. *Cotterell* (1847), 10 Q. B. 679). See also *Hammond & Co.* v. *Bussey* (1887), 20 Q. B. D. 79, and title DAMAGES.

(*o*) *Sleigh* v. *Sleigh* (1850), 5 Exch. 514; but when the party accommodated discounts the bill with bill brokers in the City of London, the bill brokers have an implied authority in following the ordinary custom of their business to make themselves liable on a guarantee of the bill to their bankers, and are entitled to recover the amount paid on the guarantee from the party accommodated, or his estate if he becomes bankrupt (*Ex parte Bishop, Re Fox, Walker & Co.* (1880), 15 Ch. D. 400). See note (*m*), p. 504, *ante*; title AGENCY, Vol. I., p. 197; title BANKERS AND BANKING, Vol. I., p. 629.

(*p*) *Re Oriental Commercial Bank, Ex parte European Bank* (1871), 7 Ch. App. 99, per MELLISH, L.J., at p. 103. See title BANKRUPTCY AND INSOLVENCY, *ante*.

The duty to provide funds or to indemnify is a contract which may be expressed or implied. It is not required to be in writing (*q*).

If two or more persons agree to become parties to an instrument for the accommodation of some other party, they are entitled and liable *inter se* to contribution as co-sureties without regard to the order of priority of their names upon the instrument (*r*).

Contribution between parties jointly liable.

SUB-SECT. 7.—*Agents.*

893. An agent is liable on his signature as a party to an instrument if he signs in his own name, unless he uses words expressly indicating that he signs in his capacity as agent only or otherwise negativing his liability (*s*). And this is the case where he is sued by a party who is in fact aware of his true position (*t*).

Agent's liability to holder.

If the agent sign an instrument in his principal's name, he is not liable on the instrument itself, although he has signed without his principal's authority; but he may be made liable to the holder in an action for deceit or breach of warranty of authority (*u*).

894. When an agent is negligent, *e.g.*, in presenting an instrument for payment or giving due notice of dishonour, he may be liable to his principal in damages for the loss incurred (*v*).

To principal.

If in fraud of his principal he converts an instrument with which he has been intrusted, he is guilty of misdemeanour under the Larceny Act, 1861 (*w*).

SUB-SECT. 8.—*Amount Recoverable.*

895. In the event of dishonour, damages may be recovered by the several parties to the instrument as follows:—

Parties entitled to damages.

The holder may recover from any party liable on the instrument. The drawer of a bill which he has been compelled to pay may recover from the acceptor. An indorser of an instrument which he has been compelled to pay may recover from the person primarily liable on the instrument (*x*), or on his default from any other prior party, *e.g.*, the drawer of a bill or any prior indorser (*a*). But it

(*q*) *Batson* v. *King* (1859), 4 H. & N. 739, unless not to be performed within a year from the making thereof (Statute of Frauds (29 Car. 2, c. 3), s. 4).

(*r*) *Reynolds* v. *Wheeler* (1861), 30 L. J. (C. P.) 350; compare *Macdonald* v. *Whitfield* (1883), 8 App. Cas. 733; and compare *Wolmershausen* v. *Gullick*, [1893] 2 Ch. 514.

(*s*) *Leadbitter* v. *Farrow* (1816), 5 M. & S. 345; *Ceylon Coaling Co.* v. *Goodrich*, [1904] P. 319; see title AGENCY, Vol. I., p. 221. The agent may sign *sans recours*. Compare Bills of Exchange Act, 1882 (45 & 46 Vict. c. 61), s. 16; see p. 479, *ante*.

(*t*) *Leadbitter* v. *Farrow*, *supra*.

(*u*) *Polhill* v. *Walter* (1832), 3 B. & Ad. 114; *West London Commercial Bank* v. *Kitson* (1884), 13 Q. B. D. 360; and see title AGENCY, Vol. I., pp. 221, 222.

(*v*) *Bank of Van Diemen's Land* v. *Bank of Victoria* (1871), L. R. 3 P. C. 526.

(*w*) 24 & 25 Vict. c. 96, ss. 75, 76.

(*x*) *I.e.*, the maker of a note, the drawer of a cheque, or the acceptor of a bill, except where it is an accommodation bill in which the person primarily liable is the person for whose accommodation the bill is drawn.

(*a*) Bills of Exchange Act, 1882 (45 & 46 Vict. c. 61), s. 57. But an indorser who has been compelled to pay a bill in an action brought by his indorsee cannot recover from the acceptor the costs which he has had to pay in such action (*Dawson* v. *Morgan* (1829), 9 B. & C. 618).

SECT. 11. Liabilities of Parties.

seems that he cannot recover if he has paid voluntarily without legal obligation (*b*).

Measure of damages.

896. The damages to be recovered are deemed to be liquidated damages (*c*), and they may include (*d*) :—

1. The amount of the instrument (*e*).

2. Interest (*f*) thereon, from the time of presentment for payment if the instrument is payable on demand, and from its maturity in any other case (*g*).

(*b*) Compare *Sleigh* v. *Sleigh* (1850), 5 Exch. 514.

(*c*) Bills of Exchange Act, 1882 (45 & 46 Vict. c. 61), s. 57 (1). This renders it possible for the plaintiff to proceed under R. S. C., Ord. 14 (*London and Universal Bank* v. *Earl of Clancarty*, [1892] 1 Q. B. 689; *Lawrence & Sons* v. *Willcocks*, [1892] 1 Q. B. 696; and *Dando* v. *Boden*, [1893] 1 Q. B. 318), even when interest and other charges are included in the damages. See note (*g*), *infra*.

(*d*) Bills of Exchange Act, 1882 (45 & 46 Vict. c. 61), s. 57 (1). It has been suggested that the items here enumerated, namely, the amount of the instrument, the interest thereon and the expenses of noting and (where necessary) of protest, do not exhaust the list of all that may be recovered. But it is not easy to find support for this view in the decisions reported. Bankers' charges etc. have, it is true, been allowed in the case of bills dishonoured abroad. But such cases with the incidents of re-exchange are dealt with by s. 57 (2); see p. 525, *post*. This sub-section, (1), deals only with instruments dishonoured in this country. And it would seem that, the subject-matter of the two sub-sections being mutually exclusive (see note (*m*), p. 525, *post*), decisions arrived at in cases dealing with sub-s. (2) cannot be used to vary the effect of the decisions on sub-s. (1). In the case of *Prehn* v. *The Royal Bank of Liverpool* (1870), L. R. 5 Exch. 92, it is true that other expenses incurred by the holder were allowed, but that was a case where the defendants undertook by a letter of credit to accept the drafts of the plaintiffs' firm and were sued for the expenses incurred in consequence of the non-fulfilment of their contract. In that case KELLY, C.B. (at p. 97), says: "It has been pointed out that in an action on a bill of exchange by an indorsee against an acceptor, neither general nor special damage can be recovered, the right of the indorsee being limited to the amount of the bill and interest. But in the case before us the action is not brought on the bill, but on a special contract, the incidents of which differ materially from those which belong to the contract constituted by becoming a party to a negotiable instrument and which are strictly limited by the law merchant." Though that case was before the Bills of Exchange Act, 1882 (45 & 46 Vict. c. 61), the reasoning was adopted by MATHEW, J., in *Banque Populaire de Bienne* v. *Cavé* (*trading as John Barwise*) (1895), 1 Com. Cas. 67, at p. 69. And see *Re English Bank of the River Plate, Ex parte Bank of Brazil*, [1893] 2 Ch. 438.

(*e*) As to the distinction between the rights of an ordinary holder for value and those of a person who has merely lent money on the security of the instrument, see pp. 498, 499, *ante*.

(*f*) In the absence of an agreement to the contrary, the rate will, it seems, be 5 per cent. per annum.

(*g*) Where in the case of a bill payable on demand no demand has been made, interest will run from the service of the writ (*Pierce* v. *Fothergill* (1835), 2 Bing. (N. C.) 167). The bill must, it seems, be produced at the trial in order to recover interest before service of the writ (*Hutton* v. *Ward* (1850), 15 Q. B. 26). Interest will apparently run until payment or judgment (*London and Universal Bank* v. *Earl of Clancarty*, [1892] 1 Q. B. 689; *Lawrence & Sons* v. *Willcocks*, [1892] 1 Q. B. 696), unless there has been a tender of the amount due, in which case it will cease as from the date of the tender (*Dent* v. *Dunn* (1812), 3 Camp. 296). As to interest after judgment, see R. S. C., Ord. 42, r. 16, and title JUDGMENTS AND ORDERS. Where money is paid into court interest must be paid up to the time of payment into court, or the plaintiff may proceed in the action for the difference (*Kidd* v. *Walker* (1831), 2 B. & Ad. 705). The guarantor of the due payment of a bill is liable for interest (*Ackermann* v. *Ehrenspeser* (1846), 16 M. & W. 99, *per* POLLOCK, C.B., at p. 103), and he may in some cases recover interest

The interest claimed by way of damages may, however, be withheld wholly or in part if the justice of the case so requires (*h*).

And where the instrument is expressed to be payable with interest at a given rate, interest as damages may or may not be given at the same rate (*i*).

3. The expenses of noting, or when protest is necessary, and the protest has been extended, the expenses of protest (*k*).

Re-exchange.

897. In the case of an instrument which has been dishonoured abroad the holder may recover from the drawer or an indorser, and the drawer or an indorser who has been compelled to pay the instrument may recover from any party liable to him, the amount of the re-exchange, with interest thereon until the time of payment (*l*). This remedy is in lieu of the remedy for dishonour of an instrument dishonoured in this country, and it is not, therefore, an alternative (*m*).

from the acceptor (*Ex parte Bishop, Re Fox, Walker & Co.* (1880), 15 Ch. D. 400, see note (*o*), p. 522, *ante*).

(*h*) Bills of Exchange Act, 1882 (45 & 46 Vict. c. 61), s. 57 (3); *Ward* v. *Morrison* (1842), Car. & M. 368. Compare *Webster* v. *British Empire Mutual Life Assurance Co.* (1880), 15 Ch. D. 169.

(*i*) Bills of Exchange Act, 1882 (45 & 46 Vict. c. 61), s. 57 (3); *Keene* v. *Keene* (1857), 3 C. B. (N. S.) 144. Compare *Gibbs* v. *Fremont* (1853), 9 Exch. 25; *Cameron* v. *Smith* (1819), 2 B. & Ald. 305.

(*k*) As to where protest is necessary, see p. 536, *post*. The expression "bank charges" on a specially indorsed writ is covered by this sub-section of the statute (*Dando* v. *Boden*, [1893] 1 Q. B. 318).

The expenses of protest for better security (see p. 537, *post*) are not recoverable under this sub-section, even though the acceptor became insolvent before maturity of the instrument (*Re English Bank of the River Plate, Ex parte Bank of Brazil*, [1893] 2 Ch. 438). Nor is a commission paid by the drawer to the acceptor for honour in consideration of his acceptance (*ibid.*).

(*l*) Bills of Exchange Act, 1882 (45 & 46 Vict. c. 61), s. 57 (2).

(*m*) *Ibid.* See also *Re Commercial Bank of South Australia* (1887), 36 Ch. D. 522, *per* NORTH, J., at p. 527: "The true construction is that when the bill is dishonoured abroad the damages mentioned in sub-s. 2 are the only damages which can be recovered."

"If an ordinary bill of exchange is drawn in one country upon persons in another and distant country, the holder who has contracted for the transfer of funds from the one country to the other almost necessarily sustains damage by the dishonour of the bill. He must take other means to put himself in funds in the country where the bill was payable. Hence the right to re-exchange, which is the measure of those damages" (*Willans* v. *Ayers* (1877), 3 App. Cas. 133, at p. 146). Thus, in *Suse* v. *Pompe* (1860), 8 C. B. (N. S.) 538, a bill was drawn in London on a Vienna firm for £750, and was dishonoured. In an action by the holders against an indorser, BYLES, J., at p. 563, says: "The holders are entitled to receive a certain number of Austrian florins in Vienna on the day when the bill is at maturity. They have, in fact, bought from the indorser so many Austrian florins to be received in Vienna on that day. It should seem to follow that on non-payment by the drawee the holders are entitled as against the indorser to so much English money as would have enabled them in Vienna on that day to purchase as many Austrian florins as they ought to have received from the drawee, and further to the expenses necessary to obtain them. The most obvious and direct mode of obtaining that English money is to draw in Vienna on the indorser in England a bill at sight for as much English money as will purchase the required number of Austrian florins at the actual rate of exchange on the day of dishonour, and to include in the amount of that bill the interest and necessary expenses of the transaction. The whole amount is called in law Latin

SECT. 11. Liabilities of Parties.

Costs.

898. A holder who has begun an action against several parties to the instrument may, after payment of the instrument by one party, continue his action against the others for costs (*n*). So also, in an action against the acceptor, the holder may proceed with his action for costs, after payment of the instrument has been tendered by another party to the instrument, and he has taken it (*o*).

But an accommodation acceptor, who pays the amount of a bill to the holder after action brought, cannot recover from the party liable to him the costs of the action (*p*), unless there is some understanding or implied request from the party liable that he should defend (*q*).

Where the holder brings two actions on two bills of exchange against the same parties where he might have brought one for the two bills, he may be allowed the costs of one action only (*r*).

SECT. 12.—*Duties of the Holder.*

SUB-SECT. 1.—*Presentment for Acceptance.*

Presentment for acceptance.

899. Presentment for acceptance applies to bills of exchange, but not to promissory notes or cheques (*s*). In the case of bills of exchange, though not always required by the form of the particular instrument, it is necessary in order to render the drawee a party liable thereon (*a*).

When required.

The bills by the form of which presentment for acceptance is required are—

recambium, in Italian *recambio*, in French *rechange*, and English re-exchange. The bill itself is called in French *retraite*. This bill for re-exchange being negotiated at Vienna, puts into the pocket of the holders at the proper time and place the exact sum which they ought to have received from the drawee. On this bill for the re-exchange the holders, of course, have not at Vienna the acceptance of the indorser on whom it is drawn, but hold as their security the original bill with the indorser's indorsement thereon. If the indorser pays the re-exchange bill, he has fulfilled his engagement of indemnity; if not, the holders sue him on the original bill, and will be entitled to recover in that action what the indorser ought to have paid, *i.e.*, the amount of the re-exchange bill. Although in English practice the re-exchange bill is seldom drawn, yet the theory of the transaction is as we have described it, and settles the principle on which the damages are to be computed, although no re-exchange bill be in fact drawn." See also *Re General South American Co.* (1877), 7 Ch. D. 637. The holder cannot at his option recover the amount he gave for the bill in England instead of the re-exchange (*Suse* v. *Pompe* (1860), 8 C. B. (N. S.) 538, *supra*). Where, however, a fixed rate is allowed by the law of the country where the instrument is dishonoured as damages on account of dishonour, such damages may be recovered here (*Re Gillespie, Ex parte Robarts* (1886), 18 Q. B. D. 286; and compare *Willans* v. *Ayers*, *supra*).

As to interest generally, see p. 524, *ante*.

It was formerly held that the acceptor of a bill was not liable to re-exchange, but it is now settled that he is (*Re Gillespie, Ex parte Robarts, supra*).

(*n*) *London and Suburban Bank* v. *Walkinshaw* (1871), 25 L. T. 704.

(*o*) *Goodwin* v. *Cremer* (1852), 18 Q. B. 757.

(*p*) *Roach* v. *Thompson* (1830), Mood. & M. 487. See p. 522, *ante*.

(*q*) *Garrard* v. *Cotterell* (1847), 10 Q. B. 679.

(*r*) *Jackson* v. *Fleeman* (1872), 26 L. T. 584.

(*s*) Bills of Exchange Act, 1882 (45 & 46 Vict. c. 61), s. 89 (3) (a). There is no acceptor to a note or cheque. See, as to marked cheques, p. 465, *ante*, and title BANKERS AND BANKING, Vol. I., pp. 606, 607.

(*a*) Bills of Exchange Act, 1882 (45 & 46 Vict. c. 61), s. 17. But a bill may be validly drawn requiring payment without acceptance (*R.* v. *Kinnear* (1838), 2 Moo. & R. 117).

(1) Those which are payable after sight or in any other case where presentment for acceptance is necessary to fix the maturity of the instrument (*b*);

(2) Those on the face of which it is expressly stipulated that they shall be presented for acceptance (*c*);

(3) Those which are drawn payable elsewhere than at the residence or place of business of the drawee (*c*).

Object of presentment.

900. In any other case presentment for acceptance is not required by the form of the bill, and it is therefore unnecessary in order to render liable any prior party thereto (*d*). In every case, the prudent course for the holder to pursue is to present the bill for acceptance, for thereby he obtains, in the case of acceptance being obtained, the security of the acceptor's signature, or, in the case of acceptance being refused, the immediate liability of all previous parties to the bill and relief from the necessity of presentment for payment (*e*).

Time and mode of presentment.

901. Presentment for acceptance should be made by or on behalf of the holder, at a reasonable hour on a business day and before the bill is overdue, to the drawee or to some person authorised to accept or refuse on his behalf (*f*). The mere exhibition of the bill by a servant of the holder to some person unknown to him on the premises of the drawee is not a due presentment (*g*).

The drawee may, however, accept when the bill is overdue, if he is willing to do so (*h*). A presentment through the post office is sufficient where it is authorised by agreement or by usage (*i*).

(*b*) Bills of Exchange Act, 1882 (45 & 46 Vict. c. 61), s. 39 (1). After sight means after acceptance in the case of a bill.

(*c*) *Ibid.*, s. 39 (2).

(*d*) *Ibid.*, s. 39 (3).

(*e*) *Ibid.*, s. 43 (2).

(*f*) *Ibid.*, s. 41 (1) (a). If handed to an agent for presentment, the agent must not be guilty of negligence in presenting the bill (*Bank of Van Diemen's Land* v. *Bank of Victoria* (1871), L. R. 3 P. C. 526). The manner of presentment depends on various circumstances. If the place of presentment is a bank, then the bill must be presented in banking hours, *i.e.*, 9 a.m. till 4 p.m. (*Parker* v. *Gordon* (1806), 7 East, 385; *Elford* v. *Teed* (1813), 1 M. & S. 28). If it is the place of business of a merchant or trader, then it must be within business hours (*Allen* v. *Edmundson* (1848), 2 Exch. 719, *per* PARKE, B., at p. 723). If it is at a private residence, then any time during which the drawee may be expected to be found is reasonable (*Wilkins* v. *Jadis* (1831), 2 B. & Ad. 188, where 8 p.m. was held reasonable).

A business day is any day which is not (1) Sunday, Good Friday, or Christmas Day; (2) a bank holiday under the Bank Holidays Act, 1871 (34 & 35 Vict. c. 17), or the Acts amending it, *e.g.*, the Holidays Extension Act, 1875 (38 & 39 Vict. c. 13) (see p. 477, *ante*); (3) a day appointed by royal proclamation as a public fast or thanksgiving day (Bills of Exchange Act, 1882 (45 & 46 Vict. c. 61), s. 92).

(*g*) *Cheek* v. *Roper* (1804), 5 Esp. 175.

(*h*) Bills of Exchange Act, 1882 (45 & 46 Vict. c. 61), s. 18 (2); and see p. 486, *ante*. The want of presentment, however, will result in the holder losing his right of recourse against the drawer and indorsers (*ibid.*, s. 42), except in the case of a bill drawn payable elsewhere than at the place of business or residence of the drawee where the holder has not time to present for acceptance before he has to present the bill for payment (*ibid.*, s. 39 (4)).

(*i*) Bills of Exchange Act, 1882 (45 & 46 Vict. c. 61), s. 41 (1) (e).

SECT. 12. Duties of the Holder.

Several drawees.

902. If a bill is addressed to two or more drawees who are not partners, presentment must be made to them all, unless one has authority to accept for all, in which case presentment may be made to him only (*k*).

Drawee dead or bankrupt.

903. In the case of a drawee who is dead or bankrupt, presentment for acceptance is altogether excused, and the bill may be treated as dishonoured by non-acceptance, or it may be presented for acceptance to the dead man's personal representative or the bankrupt's trustee (*l*).

Excuses for non-presentment.

904. Due presentment for acceptance is excused, and the bill may be treated as dishonoured by non-acceptance, (1) if the drawee is a fictitious person or a person not having the capacity to contract by bill (*m*), or (2) if after the exercise of reasonable diligence presentment cannot be effected (*n*), or (3) if, though the presentment has been irregular, the acceptance has been refused on some other ground (*o*).

Excuses for delay.

Where there is not time for the holder of a bill drawn payable elsewhere than at the place of business or residence of the drawee, with the exercise of reasonable diligence, to present it for acceptance before presenting it for payment on the day it falls due, the delay caused by presenting it for acceptance before presenting it for payment is excused (*p*).

The fact that the holder has reason to believe that the bill on presentment will be dishonoured does not excuse presentment (*q*).

Bills payable after sight.

Except when one or more of the above grounds of excuse is pertinent to the case, a bill payable after sight must either be presented by the holder for acceptance or further negotiated within a reasonable time (*r*), otherwise the drawer and all indorsers prior to that holder are discharged (*s*).

In determining what is a reasonable time the nature of the bill, the usage of trade with respect to similar bills, and the facts of the particular case are to be taken into consideration (*t*).

(*k*) Bills of Exchange Act, 1882 (45 & 46 Vict. c. 61), s. 41 (1) (b). In the case of partners (as to which see p. 492, *ante*), it is clear that if the partnership be a trading one, then one member of the partnership can bind all his colleagues. It is noteworthy that this section does not discriminate between trading and non-trading partnerships.

(*l*) *Ibid.*, s. 41 (1) (c), (d), (2) (a). A bankrupt includes any person whose estate is vested in a trustee or assignee under the law for the time being in force relating to bankruptcy (*ibid.*, s. 2).

(*m*) *Ibid.*, s. 41 (2) (a). When the drawee is a fictitious person the holder may treat the bill, if he wishes, as a promissory note (*ibid.*, s. 5 (2)), to which presentment for acceptance would not apply. As to who is a fictitious person, see p. 474, *ante*. As to persons not having the capacity to contract by bill, see p. 489, *ante*.

(*n*) *Ibid.*, s. 41 (2) (b). Due diligence is a question of fact in each case (*Bateman* v. *Joseph* (1810), 12 East, 433; *Smith* v. *Bank of New South Wales, The Staffordshire* (1872), L. R. 4 P. C. 194, 208).

(*o*) Bills of Exchange Act, 1882 (45 & 46 Vict. c. 61), s. 41 (2) (c).

(*p*) *Ibid.*, s. 39 (4).

(*q*) *Ibid.*, s. 41 (3); *Re Agra Bank, Ex parte Tondeur* (1867), L. R. 5 Eq. 160, 165.

(*r*) Bills of Exchange Act, 1882 (45 & 46 Vict. c. 61), s. 40 (1).

(*s*) *Ibid.*, s. 40 (2).

(*t*) *Ibid.*, s. 40 (3). What is a reasonable time has at times been treated as a

905. When a bill is duly presented for acceptance, and is not in fact accepted within the customary time, the person presenting it must treat it as dishonoured by non-acceptance (*a*), and notice of dishonour must be given to the drawer and each indorser (*b*), for otherwise the holder will lose his right of recourse against them (*c*).

Dishonour by non-acceptance. Notice.

If the required notices are duly given on dishonour by non-acceptance it is unnecessary to give notice of a subsequent dishonour by non-payment, unless the bill has in the meantime been accepted (*d*).

Even if the required notice is not given, the rights of a holder in due course subsequent to the omission are not prejudiced (*e*).

pure question of fact, but it would seem that it is really a mixed question of law and fact (*Ramchurn Mullick* v. *Luckmeechund Radakissen* (1854), 9 Moo. P. C. C. 46, *per* PARKE, B., who also says that, "in determining the question of reasonable time, not the interests of the drawee only, but those of the holder, must be taken into account; the reasonable time expended in putting the bill into circulation, which is for the interest of the holder, is to be allowed; and the bill need not be sent for acceptance by the very earliest opportunity, though it must be sent without improper delay").

In this case a bill payable after sight was drawn on Hong Kong and withheld from presentment for five months, as the course of exchange was adverse, and there the delay was held to be unreasonable, and on appeal the Privy Council refused to interfere with the decision of the Court below. See also *Straker* v. *Graham* (1839), 4 M. & W. 721, where a bill was drawn in Newfoundland on London, payable ninety days after sight, and no reason being given for delay in presentment, two months was held to be an unreasonable time; and contrast *Mellish* v. *Rawdon* (1832), 9 Bing. 416, where the payee of a bill payable sixty days after sight in Rio de Janeiro refrained from presentment for four months, as the course of exchange was against Rio, and the delay was held to be not unreasonable.

No doubt the term would be interpreted with much greater strictness in the case of an inland bill, but when a bill drawn in Windsor and payable in London one month after date was withheld from presentment for four days the delay was held not unreasonable (*Fry* v. *Hill* (1817), 7 Taunt. 397. Compare *Shute* v. *Robins* (1828), 3 C. & P. 80).

(*a*) Bills of Exchange Act, 1882 (45 & 46 Vict. c. 61), s. 42. The customary time is twenty-four hours, after which the drawee to whom the bill was delivered for acceptance must redeliver it with acceptance granted or declined. In reckoning the twenty-four hours non-business days must be excluded, and it seems that allowance should or may be made in the case of customary half-holidays (*e.g.*, Saturdays in places where work on that day ceases at noon). See *Bank of Van Diemen's Land* v. *Victoria Bank* (1871), L. R. 3 P. C. 526.

(*b*) Bills of Exchange Act, 1882 (45 & 46 Vict. c. 61), s. 48. As to notice of dishonour, see p. 542, *post*.

(*c*) Bills of Exchange Act, 1882 (45 & 46 Vict. c. 61), ss. 42, 48; *Roscow* v. *Hardy* (1810), 12 East, 434, *per* Lord ELLENBOROUGH, C.J., at p. 436, "If the indorsers on the bill be once discharged by the laches of the holder at the time in not giving due notice of the dishonour of it, their responsibility cannot be revived by the shifting of the bill into other hands."

They are released not only from liability on the bill, but also from liability on the consideration therefor (*Bridges* v. *Berry* (1810), 3 Taunt. 130, where the defendant, who was the acceptor of a bill which he could not pay on presentment, and who on time being given to him indorsed to the plaintiff a bill drawn by himself to his own order, was held to be released from liability on both bills by the laches of the plaintiff, who omitted to give him notice of the dishonour by non-acceptance of the second bill; *Peacock* v. *Purssell* (1863), 32 L. J. (C. P.) 266).

(*d*) Bills of Exchange Act, 1882 (45 & 46 Vict. c. 61), s. 48 (2).

(*e*) *Ibid.*, s. 48 (1); *Dunn* v. *O'Keeffe* (1816), 5 M. & S. 282.

SECT. 12. Duties of the Holder.

SUB-SECT. 2.—*Presentment for Payment.*

Presentment for payment. When necessary.

906. Bills of exchange and promissory notes must be duly presented for payment, except where otherwise provided by statute (*f*).

Although in general presentment for payment is not necessary in order to charge the person primarily liable on the instrument (*g*), it is necessary in order to obtain the right of recourse against the drawer and indorsers (*h*), and even in relation to the person primarily liable it is the more prudent course, for if action is brought upon the instrument without presentment for payment, the court will be disposed to charge the plaintiff with the costs of the action (*i*), and to fix the time from which interest is to be calculated at the date at which the action is begun (*k*).

Presentment at particular place.

Where a note is in the body of it made payable at a particular place, it must be presented at that place in order to render either the maker (*l*) or an indorser liable (*m*), but where a place of payment is indicated by way of memorandum only, presentment at that place, whether to the maker or not, will render the indorser liable, while a presentment to the maker elsewhere, if sufficient in other respects, is equally effective (*n*).

Qualified acceptance requiring presentment.

In the case of a bill the acceptance of which is qualified by the requirement of presentment for payment, it must be so presented, but the acceptor, in the absence of an express stipulation to that effect, is not discharged by the omission to present it for payment on the day that it matures (*o*).

Delivery up of instrument on payment.

It is the duty of the holder, when he presents an instrument for payment, to exhibit it to the person from whom payment is demanded, and on receiving payment to deliver it up to the party paying it (*p*).

Time for presentment.

907. When the instrument is not payable on demand it must be presented on the day that it falls due (*q*).

When it is payable on demand, then in the case of a bill it must

(*f*) Bills of Exchange Act, 1882 (45 & 46 Vict. c. 61), s. 45. As to the exceptions, see *ibid.*, s. 46, p. 534, *post*.

(*g*) *I.e.*, the acceptor in the case of a bill, the maker in the case of a note (*ibid.*, ss. 52 (1), 87 (1); *Rowe* v. *Young* (1820), 2 Bli. 391; *Price* v. *Mitchell* (1815), 4 Camp. 200).

(*h*) Bills of Exchange Act, 1882 (45 & 46 Vict. c. 61), ss. 45, 87 (2).

(*i*) *Macintosh* v. *Haydon* (1826), Ry. & M. 362.

(*k*) *Pierce* v. *Fothergill* (1835), 2 Bing. (N. C.) 167.

(*l*) Bills of Exchange Act, 1882 (45 & 46 Vict. c. 61), s. 87 (1); *Spindler* v. *Grellett* (1847), 1 Exch. 384; *Sands* v. *Clarke* (1849), 8 C. B. 751.

(*m*) Bills of Exchange Act, 1882 (45 & 46 Vict. c. 61), s. 87 (3); *Roche* v. *Campbell* (1812), 3 Camp. 247.

(*n*) Bills of Exchange Act, 1882 (45 & 46 Vict. c. 61), s. 87 (3); *Saunderson* v. *Judge* (1795), 2 Hy. Bl. 510; *Williams* v. *Waring* (1829), 10 B. & C. 2; *Masters* v. *Baretto* (1849), 8 C. B. 433.

(*o*) Bills of Exchange Act, 1882 (45 & 46 Vict. c. 61), s. 52 (2); *Smith* v. *Vertue* (1860), 30 L. J. (C. P.) 56. Unless the terms of the acceptance state expressly that it is to be payable at a particular place only, the acceptance is deemed to be a general one. See p. 488, *ante*.

(*p*) Bills of Exchange Act, 1882 (45 & 46 Vict. c. 61), s. 52 (4); *Ramuz* v. *Crowe* (1847), 1 Exch. 167. As to the case of a bill lost or destroyed, see p. 514, *ante*.

(*q*) Bills of Exchange Act, 1882 (45 & 46 Vict. c. 61), s. 45 (1).

be presented within a reasonable time after its issue in order to render the drawer liable, and within a reasonable time after its indorsement in order to render the indorser liable (*r*); and in the case of a note which has been indorsed it must be presented within a reasonable time after its indorsement, or the indorser will be discharged (*s*). In determining what is a reasonable time in the case of either instrument, the nature of the instrument, the usage of trade, and the facts of the particular case will be taken into consideration (*t*).

Cheques.

908. A cheque is a bill payable on demand (*a*), and should be presented within a reasonable time of its issue. But failure to so present it does not discharge the drawer, as a right of action subsists against him, and is only barred by the operation of the Statute of Limitations (*b*).

Delay in presentment.

Where, however, a cheque is not presented within a reasonable time of its issue, and the drawer or the person on whose account it is drawn had the right at the time of such presentment as between him and the banker to have the cheque paid and suffers actual damage through the delay, he is discharged to the extent of such damage, that is to say to the extent to which such drawer or person is a creditor of such banker to a larger amount than he would have been had such cheque been paid (*c*).

Where the drawer or the person on whose account the cheque is drawn is so discharged, the holder becomes the creditor of the banker to the extent of such discharge, and is entitled to recover the amount from him (*d*).

An indorser is discharged if the presentment is not duly made within reasonable time after indorsement (*e*).

What is a reasonable time is a question of fact in each case, and in the determination thereof regard must be had to the nature of the instrument, the usage of trade and of bankers, and the facts of the particular case (*f*). A banker who is an unreasonable time in

(*r*) Bills of Exchange Act, 1882 (45 & 46 Vict. c. 61), s. 45 (2).

(*s*) *Ibid.*, s. 86 (1); *Chartered Mercantile Bank of India, London and China* v. *Dickson* (1871), L. R. 3 P. C. 574.

(*t*) Bills of Exchange Act, 1882 (45 & 46 Vict. c. 61), ss. 45 (2), 86 (2). The nature of the instrument, whether bill or note, differs widely, for while it is true that "a prompt and regular demand of payment may frequently obtain payment from an acceptor of a bill and maker of a note, who is in a state of progressive insolvency, when a subsequent application of the same nature would become unavailing" (see Story, Bills of Exchange, 6th ed. s. 325), yet a note, being more likely than a bill to be intended as a continuing security, may be reasonably the subject of a comparatively long delay before presentment. See *Chartered Mercantile Bank of India, London and China* v. *Dickson* (1871), L. R. 3 P. C. 574, and note (*h*), p. 532, *post*.

(*a*) Bills of Exchange Act, 1882 (45 & 46 Vict. c. 61), s. 73; see p. 462, *ante*.

(*b*) *Laws* v. *Rand* (1857), 3 C. B. (N. S.) 442.

(*c*) Bills of Exchange Act, 1882 (45 & 46 Vict. c. 61), s. 74 (1). Formerly if the drawer suffered injury through delay in presentment for an unreasonable time he was entirely discharged (*Hopkins* v. *Ware* (1869), L. R. 4 Exch. 268). See title BANKERS AND BANKING, Vol. I., pp. 590, 591.

(*d*) Bills of Exchange Act, 1882 (45 & 46 Vict. c. 61), s. 74 (3).

(*e*) *Ibid.*, s. 45 (2).

(*f*) *Ibid.*, s. 74 (2); *Serle* v. *Norton* (1841), 2 Moo. & R. 401; title BANKERS

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presenting a cheque paid in by his customer is liable to his customer for the loss (if any) which results from the delay (*g*).

Notes.

909. When a note payable on demand is negotiated, it is not deemed to be overdue for the purpose of affecting the holder with defects of title of which he had no notice by reason that it appears that a reasonable time for presenting it for payment has elapsed since its issue (*h*).

Mode of presentment.

910. Presentment for payment, to be sufficient, must be made personally by the holder or by some person authorised to receive payment on his behalf (*i*), except where presentment through the post-office is authorised by special agreement or general usage (*k*). Moreover, it must be made at a reasonable hour (*l*), on a business day (*m*), and at the proper place (*n*); and it must be made to the

AND BANKING, Vol. I., p. 590. The provision as to reasonable time is held to be complied with (1) where the holder and the banker on whom it is drawn are in the same place, if the cheque is presented for payment on the day after it is received (*Alexander* v. *Burchfield* (1842), 7 Man. & G. 1061), but the time is not extended by the fact that the holder pays the cheque into his own account with his banker, in order that he may present it for payment to the paying banker, unless the cheque was crossed when he became its holder (*ibid.*); (2) where the holder and the banker on whom it is drawn are in different places, if the cheque is forwarded for presentment for payment on the day after it is received, and the agent to whom it is forwarded presents it or again forwards it on the day after he receives it (*Hare* v. *Henty* (1861), 30 L. J. (C. P.) 302; *Prideaux* v. *Criddle* (1869), L. R. 4 Q. B. 455). But allowance will be made for special circumstances, *e.g.*, where the payee is ill (*Firth* v. *Brooks* (1861), 4 L. T. 467). In determining the question non-business days (see note (*f*), p. 527, *ante*) must of course be excluded.

(*g*) *Hare* v. *Henty* (1861), 30 L. J. (C. P.) 302. Compare *Forman* v. *Bank of England* (1902), 18 T. L. R. 339. See, further, title BANKERS AND BANKING, Vol. I., p. 591.

(*h*) Bills of Exchange Act, 1882 (45 & 46 Vict. c. 61), s. 86 (3). See cases cited in note (*g*), *supra*; *Brooks* v. *Mitchell* (1841), 9 M. & W. 15, where it was held that such a note could not be deemed overdue because it was indorsed years after its date, and no interest had been paid on it for a considerable time before indorsement; *Glasscock* v. *Balls* (1889), 24 Q. B. D. 13.

(*i*) Bills of Exchange Act, 1882 (45 & 46 Vict. c. 61), s. 45 (3). The person who presents the instrument must be able to give a valid discharge in case of payment; where the presentment is made by an agent of the holder, the agent is bound to use due diligence on behalf of his principal.

(*k*) Bills of Exchange Act, 1882 (45 & 46 Vict. c. 61), s. 45 (8); *Heywood* v. *Pickering* (1874), L. R. 9 Q. B. 428.

(*l*) Bills of Exchange Act, 1882 (45 & 46 Vict. c. 61), s. 45 (3). Where the bill is payable at a bank presentment must be within banking hours (*Parker* v. *Gordon* (1806), 7 East, 385; *Whitaker* v. *Bank of England* (1834), 6 C. & P. 700). The inference that presentment was within such hours cannot be drawn from it being made by a notary (*Elford* v. *Teed* (1813), 1 M. & S. 28). Where it is payable at the business premises of a merchant or trader, the hours are not so strict (*Barclay* v. *Bailey* (1810), 2 Camp. 527), nor at those of a solicitor (*Triggs* v. *Newnham* (1825), 1 C. & P. 631). In both these cases the time was 8 p.m. When at a private house, in the opinion of the court 12 midnight would be unreasonable, but 7 to 8 p.m. would not, though at the time the house was shut up, and there was no one there to pay the bill (*Wilkins* v. *Jadis* (1831), 2 B. & Ad. 188).

(*m*) As to what is a business day, see Bills of Exchange Act, 1882 (45 & 46 Vict. c. 61), s. 92, and note (*f*), p. 527, *ante*. As to when the instrument falls due on a non-business day, see *ibid.*, s. 14, and p. 477, *ante*.

(*n*) As to the proper place, see p. 533, *post*.

person primarily liable on the instrument (*o*), or to some person authorised to pay or to refuse payment on his behalf, if with the exercise of reasonable diligence such person can be found at the place of presentment.

Proper place.

911. A bill or note is presented at the proper place when a place of payment is specified in the instrument, and it is there presented (*p*); if alternative places are specified, then presentment may be made at either (*q*). Where no place of payment is specified, but the address of the person to make payment is given in the instrument, it may be there presented (*r*). Where no place is specified, and no address is given, the instrument may be presented at the usual place of business, if known, and if not, then at the ordinary residence, if known, of the person to make payment (*s*). In any other case, the instrument may be presented to the person to make payment wherever he can be found or at his last known place of business or residence (*t*).

Where an instrument is presented at the proper place, and after the exercise of reasonable diligence no person authorised to pay or to refuse payment can be found there, no further presentment to the person primarily liable is required (*a*).

Several acceptors.

If two or more persons, who are not partners, are primarily liable, and no place of payment is specified, presentment must be made to them all, unless one of them has authority to act for the others (*b*).

Acceptor dead.

If the person primarily liable is dead, and no place of payment is specified, presentment must be made to a personal representative, if such there be, and with the exercise of reasonable diligence he can be found (*c*).

Excuses for delay.

912. Delay in making presentment for payment is excused where it is caused by circumstances beyond the control of the holder and not imputable to his default, misconduct, or negligence, but when the cause of delay ceases to operate presentment must be made with reasonable diligence (*d*).

(*o*) *I.e.*, to the acceptor of a bill or the maker of a note.

(*p*) Bills of Exchange Act, 1882 (45 & 46 Vict. c. 61), ss. 45 (4) (a), 87, 89. The place may be specified either by the drawer (*Gibb* v. *Mather* (1832), 2 Cr. & J. 254) or by the acceptor (*Saul* v. *Jones* (1858), 28 L. J. (Q. B.) 37).

(*q*) *Beeching* v. *Gower* (1816), Holt (N. P.), 313.

(*r*) Bills of Exchange Act, 1882 (45 & 46 Vict. c. 61), s. 45 (4) (b); *Buckstone* v. *Jones* (1840), 9 L. J. (C. P.) 257.

(*s*) Bills of Exchange Act, 1882 (45 & 46 Vict. c. 61), s. 45 (4) (c); compare *Crosse* v. *Smith* (1813), 1 M. & S. 545.

(*t*) Bills of Exchange Act, 1882 (45 & 46 Vict. c. 61), s. 45 (4) (d).

(*a*) *Ibid.*, s. 45 (5); *Hine* v. *Allely* (1833), 4 B. & Ad. 624. See also *Bailey* v. *Porter* (1845), 14 M. & W. 44, where it was decided that where a bill is accepted payable at a banker's, and that banker becomes the holder, further presentment is superfluous.

(*b*) Bills of Exchange Act, 1882 (45 & 46 Vict. c. 61), s. 45 (6).

(*c*) *Ibid.*, s. 45 (7).

(*d*) *Ibid.*, s. 46 (1). As to delay when a bill payable elsewhere than at the place of business or residence of the drawee is presented late for acceptance, see *ibid.*, s. 39 (4), p. 528, *ante*.

The difficulty of communication incident to wars or political disturbance may excuse delay (*Patience* v. *Townley* (1805), 2 Smith, K. B. 223), or the passing of a

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The fact that the holder has reason to believe that the bill will be dishonoured on presentment does not dispense with the necessity for presentment (*e*).

Excuses for non-presentment.

Presentment is dispensed with, however, where after the exercise of reasonable diligence it cannot be effected as the statute requires (*f*), or where the drawee is a fictitious person (*g*), or where it is expressly or impliedly waived (*h*).

It is not required in order to charge the drawer where the drawee or acceptor is not bound, as between himself and the drawer, to accept or pay the bill, and the drawer has no reason to believe that the bill would be paid if presented (*i*); nor in order to charge an indorser where the instrument was made or accepted for his accommodation, and he has no reason to expect it to be paid if presented (*k*).

law in the country where the instrument is payable declaring a moratorium, that is, deferring the maturity of bills then current (*Rouquette* v. *Overmann* (1875), L. R. 10 Q. B. 525).

But in ordinary times delay, which is unexplained, even when of very short duration, will result in the holder being found guilty of laches (*Anderton* v. *Beck* (1812), 16 East, 248, where the delay was for one day only).

A delay by request of the drawer or indorser, if he is the person sought to be charged, would no doubt be held excusable (*Lord Ward* v. *Oxford, Worcester and Wolverhampton Rail. Co.* (1852), 2 De G. M. & G. 750).

(*e*) Bills of Exchange Act, 1882 (45 & 46 Vict. c. 61), s. 46 (2) (a). This is so even when the acceptor has told the holder that he would not pay the bill when due (*Ex parte Bignold, Re Brereton* (1836), 1 Deac. 712; *Hill* v. *Heap* (1823), Dow. & Ry. (N. P.) 57). Presentment must also be made when the acceptor becomes bankrupt (*Warrington* v. *Furbor* (1807), 8 East, 242, *per* Lord ELLENBOROUGH, C.J., at p. 245; *Esdaile* v. *Sowerby* (1809), 11 East, 114), or when the maker of a note becomes insolvent and absconds without leaving effects behind (*Sands* v. *Clarke* (1849), 19 L. J. (C. P.) 84; *Camidge* v. *Allenby* (1827), 6 B. & C. 373).

(*f*) Bills of Exchange Act, 1882 (45 & 46 Vict. c. 61), s. 46 (2) (a). What amounts to due diligence is a matter of fact to be decided in each case. Thus, where a note was made payable at a town where the maker had no residence, a presentment at two banks was held sufficient (*Hardy* v. *Woodroofe* (1818), 2 Stark. 319). See also *Hine* v. *Allely* (1833), 4 B. & Ad. 624; *Buxton* v. *Jones* (1840), 1 Man. & G. 83. But where a bill was accepted on behalf of the drawee by his agent, and in the drawee's absence at maturity no presentment was made to the agent, it was held that insufficient diligence was shown (*Philips* v. *Astling* (1809), 2 Taunt. 206).

(*g*) Bills of Exchange Act, 1882 (45 & 46 Vict. c. 61), s. 46 (2) (b); *Smith* v. *Bellamy* (1817), 2 Stark. 223. As to "fictitious person," see p. 474, *ante*.

(*h*) Bills of Exchange Act, 1882 (45 & 46 Vict. c. 61), s. 46 (2) (e); *Hopley* v. *Dufresne* (1812), 15 East, 275. But waiver of notice of dishonour does not of itself imply waiver of the fact of presentment (*Hill* v. *Heap* (1823), Dow. & Ry. (N. P.) 57).

(*i*) Bills of Exchange Act, 1882 (45 & 46 Vict. c. 61), s. 46 (2) (c); *Re Boyse, Crofton* v. *Crofton, Canonge's Claim* (1886), 33 Ch. D. 612.

(*k*) Bills of Exchange Act, 1882 (45 & 46 Vict. c. 61), s. 46 (2) (d). But where the instrument is drawn for the accommodation of the drawer, it must be presented if it is desired to charge an indorser (*Saul* v. *Jones* (1858), 28 L. J. (Q. B.) 37, *per* Lord CAMPBELL, C.J., at p. 40: "In an action against a drawer there might have been abundant excuse, but the indorser has every reason to believe that his bill will be paid if presented at the proper time and place, and to charge him there must be no departure from the terms apparent on the bill. There is no authority to show that want of effects is any excuse for want of notice of dishonour or presentment as against an indorser"). Where it is desired to charge a person who was not a party to

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913. An instrument is dishonoured by non-payment either when it is duly presented for payment and payment is refused or cannot be obtained, or when, presentment being excused, the instrument is overdue and unpaid (*l*). Dishonour by non-payment.

Except in the case of bills accepted for honour, there accrues to the holder immediately after dishonour by non-payment the right of recourse against all persons secondarily liable on the instrument (*m*). Effect of dishonour.

SUB-SECT. 3.—*Noting and Protest.*

914. A protest (*n*) is, properly speaking, a solemn declaration on behalf of the holder against any loss to be sustained by the non-acceptance or by the non-payment of a bill or note, as the case may be (*o*). It must be made and signed (*p*) by a notary public, an official recognised by law whose business it is to make and attest important documents (*q*). Protest.

915. The notary or his clerk proceeds to make a formal demand upon the drawee or acceptor for acceptance or payment, as the case may be, and on refusal notes the bill; that is, he writes a minute on the face of the bill. This minute consists of his initials, the date, the noting charges, and a reference to the notary's register. Noting.

A ticket or label is also attached to the bill, on which is written the answer given to the notary's clerk who makes the presentment, *e.g.*, "No orders" or "No effects." Before sending out the bill the notary makes a full copy of it in his register and subsequently adds the answer, if any (*r*).

916. A protest, besides being made and signed by a notary, must contain a copy of the instrument, and must specify—(1) the person at whose request the instrument is protested; (2) the place and date of protest; (3) the cause or reason for protesting the instrument; Contents of protest.

the bill, but merely guaranteed its payment (at all events on behalf of the acceptor), presentment is not necessary (*Carter* v. *White* (1883), 25 Ch. D. 666, *per* COTTON, L.J., at p. 670). *Quære* if this is so where the party guaranteed by the surety was the drawer or an indorser, for by the terms of s. 45 want of due presentment discharges the drawer or indorsers. And in any case this would not apply to a case where by custom a broker, instead of indorsing a number of bills individually, gave a guarantee of liability to the bankers who discounted them; compare *Ex parte Bishop, Re Fox, Walker & Co.* (1880), 15 Ch. D. 400.

(*l*) Bills of Exchange Act, 1882 (45 & 46 Vict. c. 61), s. 47 (1).

(*m*) *Ibid.*, s. 47 (2). As to bills accepted for honour, see *ibid.*, ss. 65—68, and p. 539, *post*.

(*n*) For forms of protest, see Encyclopædia of Forms, Vol. II., pp. 521 *et seq.*

(*o*) Story, Bills of Exchange, 6th ed. s. 276.

(*p*) Bills of Exchange Act, 1882 (45 & 46 Vict. c. 61), s. 51 (7). It is, as a matter of fact, always issued with the official seal of the notary. See title NOTARIES.

(*q*) See title NOTARIES. For the course to be pursued where no notary public is available, see p. 536, *post*.

(*r*) See title NOTARIES. An entry made in the notary's register by the clerk who presented the instrument at the time of the dishonour is receivable as evidence in an action on proof of the death of the clerk (*Poole* v. *Dicas* (1835), 1 Bing. (N. C.) 649). The costs of the notary are recoverable as liquidated damages; see p. 525, *ante*.

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(4) the demand made, and (5) the answer given, if any, or the fact that the drawee or acceptor could not be found (*s*).

Where an instrument is lost or destroyed, or is wrongly detained from the person entitled to hold it, protest may be made on a copy or written particulars thereof (*a*).

A protest may be made out in duplicate, and the second copy is as much primary evidence as the copy first drawn out (*b*).

No witnesses are required to attest a protest by a notary public (*c*), but it must be stamped (*d*).

Object of notarial protest.

917. The object of requiring the protest to be made by a notary public is that his office is universally recognised not only in the courts of this country, but in those of every civilised nation. By the law of nations he has credit everywhere (*e*).

Protest where no notary available.

But in cases where a protest is necessary, and where the services of a notary cannot be obtained at the time and place where they are required, any householder or substantial resident of the place may in the presence of two witnesses give a certificate signed by them attesting the dishonour of the instrument, and such a certificate will in all respects operate as if it were a notarial protest (*f*).

When protest necessary.

918. Protest is only *necessary* in the case of a foreign bill appearing on its face to be such. Where such a bill has been dishonoured by non-acceptance it must be duly protested for non-acceptance; and where it has not been previously dishonoured by non-acceptance, but is dishonoured by non-payment, it must be duly protested for non-payment, otherwise the drawer and indorsers are discharged (*g*).

But a bill which is in reality a foreign bill, but does not on the face of it appear to be so, need not be protested in case of dishonour (*h*). Nor is protest necessary, for English purposes, in the case of a foreign promissory note (*i*).

(*s*) Bills of Exchange Act, 1882 (45 & 46 Vict. c. 61), s. 51 (7).

(*a*) *Ibid.*, s. 51 (8). See, as to lost instruments, *ibid.*, ss. 69, 70, at p. 514, *ante*.

(*b*) *Geralopulo* v. *Wieler* (1851), 20 L. J. (C. P.) 105.

(*c*) Brooke's Notary, 6th ed. p. 84.

(*d*) See p. 579, *post*. The stamp, which never exceeds 1*s*., may be an adhesive one, and must be cancelled by the notary; see Stamp Act, 1891 (54 & 55 Vict. c. 39), s. 90.

(*e*) *Hutcheon* v. *Mannington* (1802), 6 Ves. 823, *per* Lord ELDON, L.C., at p. 824.

(*f*) Bills of Exchange Act, 1882 (45 & 46 Vict. c. 61), s. 94. For form of protest for use in such a case see *ibid.*, Sched. I.; Encyclopædia of Forms, Vol. II., p. 523.

(*g*) Bills of Exchange Act, 1882 (45 & 46 Vict. c. 61), s. 51 (2). The costs of protest, when necessary, can be recovered as liquidated damages; see p. 525, *ante*.

(*h*) *Ibid.* A foreign bill, that does not appear on the face of it to be so, may be treated by the holder as an inland bill. See *ibid.*, s. 4 (2), and p. 475, *ante*; see also note (*i*), *infra*.

(*i*) *Ibid.*, s. 89 (4); *Bonar* v. *Mitchell* (1850), 5 Exch. 415. But both in this case and in the case of a foreign bill which does not appear to be such it must be remembered that the release from duty to protest applies to English law only. In order to charge a party in a foreign country, protest should be made in case it is required by the laws of that country.

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Protest of inland instruments.

919. Where the instrument which has been dishonoured is an inland instrument, it may, if the holder think fit, be noted for non-acceptance or non-payment; but it is not necessary to note or protest it in order to preserve the recourse against the drawer or indorser (*k*). There are certain advantages in causing even an inland instrument to be noted. Not only is the notary a person whose business it is to know and to adopt the proper measures when an instrument is dishonoured, and therefore both the best agent for the carrying out of such measures and the best witness at a trial of their having been carried out, but his minute on the instrument itself is the most satisfactory record of the non-payment of the instrument for the information of the parties who may thereafter be called upon to pay.

Acceptance etc. for honour.

It is necessary if it is desired to obtain an acceptance or payment for honour that the instrument should first be protested, or at least noted for protest (*l*).

Costs.

The costs of noting an inland instrument are recoverable as liquidated damages (*m*).

Subsequent protest.

920. A bill which has been protested for non-acceptance may be subsequently protested for non-payment (*n*).

Protest for better security.

921. Where the acceptor becomes a bankrupt or insolvent, or suspends payment, before maturity of the bill, the holder may cause the bill to be protested for better security against the drawer and indorsers (*o*). The advantage of this course, beyond the inherent one of having the circumstances placed on record for the information of the drawer and indorsers, is that it enables the bill to be accepted for honour (*p*).

Costs.

The expenses, however, of a protest for better security are not recoverable, whereas those for protest for non-acceptance or non-payment are (*q*).

Place of protest.

922. The general rule is that a bill must be protested at the place where it is dishonoured (*r*); but when it has been presented

(*k*) Bills of Exchange Act, 1882 (45 & 46 Vict. c. 61), s. 51 (1). It is of course in any case unnecessary in order to render liable the acceptor or maker (*ibid.*, s. 52).

(*l*) Bills of Exchange Act, 1882 (45 & 46 Vict. c. 61), ss. 65 (1), 68 (1).

(*m*) *Ibid.*, s. 57 (1) (c). See p. 525, *ante*.

(*n*) *Ibid.*, s. 51 (3).

(*o*) *Ibid.*, s. 51 (5).

(*p*) *Ibid.*, s. 65 (1), p. 539, *post*.

(*q*) *Ibid.*, s. 57 (1) (c). The expenses of noting, or when protest is necessary and the protest has been extended the expenses of protest, are part of the liquidated damages recoverable on dishonour. But protest for better security is not "necessary," and the expenses therefore cannot be recovered (*Re English Bank of the River Plate, Ex parte Bank of Brazil*, [1893] 2 Ch. 438). If, after noting or protest, the drawee determines to honour the bill, he must repay to the holder the expenses of noting or protest (*ibid*, s. 57 (1) (c)).

(*r*) Bills of Exchange Act, 1882 (45 & 46 Vict. c. 61), s. 51 (6); *Mitchell* v. *Baring* (1829), 10 B. & C. 4, where upon protest for non-acceptance a bill drawn abroad on a firm in Liverpool and payable to a firm in London was accepted in London for the honour of the payee, the acceptance for honour being in these terms: "if regularly protested and refused when due." The bill

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through the post-office, and returned by post dishonoured, it may be protested at the place to which it is returned and on the day of its return if received during business hours, and if not received during business hours, then not later than the next business day (*s*).

And when, being drawn payable at the place of business or residence of some person other than the drawee, it has been dishonoured by non-acceptance, it must be protested for non-payment at the place where it is expressed to be payable, and no further presentment for payment to or demand on the drawee is necessary (*t*).

When noting equivalent to protest.

Where an instrument is required by the statute to be protested before some further proceeding is taken, it is sufficient that the instrument has been noted for protest before the taking of that proceeding, and the formal protest may be extended at any time thereafter as of the date of the noting (*a*).

Time of noting or protest.

The noting of a dishonoured instrument must take place on the day of its dishonour, but when it has been duly noted the protest may be extended as of the date of the noting (*b*).

Excuses for delay.

Delay in noting or protesting is excused when the delay is caused by circumstances beyond the control of the holder and not imputable to his default, misconduct, or negligence; but when the cause of delay ceases to operate the instrument must be noted or protested with reasonable diligence (*c*).

Protest is dispensed with altogether by any circumstance which would dispense with notice of dishonour (*d*).

Protest where acceptance partial or qualified.

923. In the case of a foreign bill which has been accepted in part the bill must be protested as to the balance (*e*); but where there is a qualified acceptance the holder is entitled to treat the bill as dishonoured by non-acceptance, and the better course is to

was presented at maturity to the drawees at Liverpool, and on being dishonoured by them was duly protested there. It was held that the bill was rightly presented and protested there.

(*s*) Bills of Exchange Act, 1882 (45 & 46 Vict. c. 61), s. 51 (6) (a).

(*t*) *Ibid.*, s. 51 (6) (b).

(*a*) *Ibid.*, s. 93.

(*b*) *Ibid.*, s. 51 (4). It may be extended up to any time, even at or after commencement of the trial of an action on the instrument (*Geralopulo* v. *Wieler* (1851), 20 L. J. (C. P.) 105; *Orr* v. *Maginnis* (1806), 7 East, 359).

(*c*) Bills of Exchange Act, 1882 (45 & 46 Vict. c. 61), s. 51 (9). See p. 547, *post*, as to delay in giving notice of dishonour; see also *Rothschild* v. *Currie* (1841), 1 Q. B. 43, where, in the case of a foreign bill drawn on a firm in Paris and payable there, the day on which the protest and registration should have taken place was the *fête du roi*, and the public registry was therefore closed at twelve, in consequence of which and of the pressure on the office by the accumulated business on the following day the notary was unable to complete registration until after post-time on that day, and notice was not sent out till the day after that, but it was nevertheless held that due diligence had in fact been used.

(*d*) Bills of Exchange Act, 1882 (45 & 46 Vict. c. 61), s. 51 (9). See p. 547, *post*; *Legge* v. *Thorpe* (1810), 12 East, 170, where it was held that in the case of an action against a drawer, who could not reasonably have expected the bill to be honoured by the drawee, protest might be dispensed with; see also *Campbell* v. *Webster* (1845), 15 L. J. (C. P.) 4, where it was held that a promise to pay constitutes waiver of protest and notice.

(*e*) Bills of Exchange Act, 1882 (45 & 46 Vict. c. 61), s. 44 (2). See p. 488, *ante*.

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so treat it and to protest absolutely for want of acceptance according to the tenor of the bill, unless the holder is authorised by antecedent parties to assent to the qualification; otherwise any antecedent party (whether drawer or indorser) who has not authorised or does not subsequently assent to the qualification is released from his liability on the bill (*f*).

Notice of protest.

924. In most foreign countries it is necessary to send to the party whom it is proposed to charge notice of the protest and a copy of it.

Such, indeed, was at one time the law in England, at all events in the case of the party to be charged residing abroad, but it is not necessary at the present day for purposes of suit in England to send a copy of the protest or even to state in the notice of dishonour that the bill has been protested (*g*).

SUB-SECT. 4.—*Acceptance for Honour.*

Acceptor for honour.

925. Upon the protest or noting for protest of a bill there may come upon the scene a new party to the bill in the person of the acceptor for honour *supra* protest.

He may intervene either where a bill has been protested for dishonour by non-acceptance or where it has been protested for better security and is not overdue (*h*). But in either case he must be a person who is not already liable as a party to the bill (*i*). And he must have the consent of the holder (*k*).

His acceptance may be for the honour of the drawer or the indorser, or one or more of them, or for the honour of the bill, *i.e.*, of all the parties liable thereon (*l*); but where an acceptance for honour does not expressly state for whose honour it is made, it is presumed to be for the honour of the drawer (*m*).

Rights and duties.

If, in pursuance of his acceptance, he is called upon to pay, and does pay, the bill, he succeeds to the rights and duties of the holder

(*f*) Bills of Exchange Act, 1882 (45 & 46 Vict. c. 61), s. 44 (1), (2). See pp. 487, 488, *ante*.

(*g*) *Ex parte Lowenthal, Re Lowenthal* (No. 2) (1874), 9 Ch. App. 591, *per* JAMES, L.J., at p. 593: "According to some of the old authorities, it seems to have been supposed that the notice of dishonour ought to have been accompanied by a copy or memorial of the protest. But in the first case in which the question was formally considered, in *Goodman* v. *Harvey* ((1836), 4 Ad. & El. 870, it was decided that this was not necessary, and that it was sufficient if notice of the protest was sent. In the present case the notice merely stated, as in the case of an English bill, that the bill had been duly presented and returned dishonoured. I think that was sufficient notice to anyone who knew the law (which everyone must be taken to know) that everything had been done in due form to enable the holder of the bill to proceed against the drawer."

(*h*) Bills of Exchange Act, 1882 (45 & 46 Vict. c. 61), s. 65 (1). As to protest for dishonour by non-acceptance, see p. 536, *ante*, and as to protest for better security, see p. 537, *ante*. As to the date of maturity of a bill payable after sight which has been accepted for honour, see p. 476, *ante*.

(*i*) Bills of Exchange Act, 1882 (45 & 46 Vict. c. 61), s. 65 (1). This phrase would seem to include the drawee, who, though declining to accept the bill outright, may yet accept it for the honour of the drawer or an indorser, and thereby incur a minor risk of ultimate loss.

(*k*) *Ibid.*

(*l*) *Ibid.* See Story, Bills of Exchange, 6th ed. s. 121.

(*m*) *Ibid.*, s. 65 (4).

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as regards the party for whose honour he pays, and all parties liable to that party (*n*).

The policy of this rule, granting privileges to the acceptor for honour *supra* protest, is to induce the friends of the drawer and indorser to render them service for the benefit of commerce and the credit of the trader (*o*).

Second acceptor for honour.

It remains in doubt whether, after one has accepted a bill *supra* protest for the honour of one party, another may accept it *supra* protest for the honour of another party, for such a proceeding would be repugnant to the principle that there cannot be more than one general acceptance of a bill (*p*); but it may be that if the acceptor for honour becomes bankrupt or insolvent or suspends payment before the bill matures, a second acceptance for honour may be obtained (*q*).

Holder's option to decline.

926. The acceptor for honour may, if he chooses, accept for part only of the sum for which the bill is drawn (*r*); but, whether he accept for the whole or for part, the holder may, at his discretion, receive or decline the acceptance. An acceptance for honour must be written on the bill, signed by the acceptor for honour, and indicate that it is an acceptance for honour (*s*).

Extent of liability.

927. The contract made by the acceptor for honour by his acceptance is that he will on due presentment pay the bill according to the tenor of his acceptance, if it is not paid by the drawee, provided that it has been duly presented for payment and protested for non-payment, and that he receives notice of these facts (*a*).

He makes himself by his acceptance liable, subject to the last rule, to the holder and to all parties to the bill subsequent to the party for whose honour he has accepted (*b*), and he is bound alike by the estoppels which bind the original acceptor and those which bind the party for whose honour he has accepted (*c*).

Time for presentment for payment.

928. Where the address of the acceptor for honour is in the same place where the bill is protested for non-payment, the bill must be presented to him not later than the day following its maturity; and

(*n*) Bills of Exchange Act, 1882 (45 & 46 Vict. c. 61), s. 68 (5). "All parties liable to that party" includes the acceptor where a bill is protested for better security.

(*o*) Story, Bills of Exchange, 6th ed. s. 122.

(*p*) See Beaw., 6th ed. 569 (42). Compare *Jackson* v. *Hudson* (1810), 2 Camp. 447.

(*q*) See Story, Bills of Exchange, 6th ed. s. 122.

(*r*) Bills of Exchange Act, 1882 (45 & 46 Vict. c. 61), s. 65 (2).

(*s*) *Ibid.*, s. 65 (3) (a), (b). It is the usual practice for the acceptance for honour to be attested by a notarial "act of honour" recording the acceptance (Brooke's Notary, 6th ed. p. 89). See *Mitchell* v. *Baring* (1829), 10 B. & C. 4, and p. 541, *post.*

(*a*) Bills of Exchange Act, 1882 (45 & 46 Vict. c. 61), s. 66 (1); *Hoare* v. *Cazenove* (1812), 16 East, 391; *Williams* v. *Germaine* (1827), 7 B. & C. 468.

(*b*) Bills of Exchange Act, 1882 (45 & 46 Vict. c. 61), s. 66 (2).

(*c*) As to what these are, see *ibid.*, ss. 54, 55, pp. 517, 518, *ante;* and see *Phillips* v. *Im Thurn* (1866), L. R. 1 C. P. 463, where it was held that an acceptor for the honour of the drawer was estopped from denying that the bill was a valid bill, and from pleading that the payee was a fictitious person, of which fact he was in ignorance when he accepted the bill for honour.

where the address of the acceptor for honour is in some place other than the place where it was protested for non-payment, the bill must be forwarded not later than the day following its maturity for presentment to him (*d*).

Excuses for delay etc.

929. Delay in presentment or non-presentment to the acceptor for honour is excused by any circumstance which would excuse delay in presentment for payment or non-presentment for payment (*e*). When a bill of exchange is dishonoured by the acceptor for honour it must be protested for non-payment by him (*f*).

SUB-SECT. 5.—*Payment supra Protest.*

Payment *supra* protest.

930. Any person, whether liable as a party to the bill or not, may intervene after it has been protested for non-payment and pay it *supra* protest for the honour of any party liable thereon, or for the honour of the person for whose account it was drawn (*g*).

Necessity for act of honour.

But in order to operate as a payment for honour *supra* protest, and not as a mere voluntary payment, the transaction must be attested by a notarial act of honour, which may be appended to the protest or form an extension of it (*h*).

And this notarial act of honour must be founded upon a declaration made by the payer for honour or by his agent in that behalf declaring his intention to pay the bill for honour, and for whose honour he pays it (*i*). Where two or more parties offer to pay a bill for the honour of different parties, the person whose payment will discharge most parties to the bill is the one preferred (*k*).

Effect of payment for honour.

931. The effect of a payment for honour is to discharge all parties to the bill subsequent to the party for whose honour it is paid and to substitute for the holder the payer for honour, who thereby succeeds both to the rights and to the duties of the holder in regard to the party for whose honour the bill is paid and all parties liable to that party (*l*). On payment to the holder of the amount of the bill and the notarial expenses incidental to its dishonour the payer for honour is entitled to receive both the bill itself and the protest. If the holder does not deliver them up to him on demand, the holder is liable to him in damages (*m*).

(*d*) Bills of Exchange Act, 1882 (45 & 46 Vict. c. 61), s. 67 (2).

(*e*) *Ibid.*, s. 67 (3). See *ibid.*, s. 46 (1), (2), and pp. 533, 534, *ante*.

(*f*) *Ibid.*, s. 67 (4).

(*g*) *Ibid.*, s. 68 (1). A promissory note may also perhaps be paid *supra* protest, but see Story on Promissory Notes, 7th ed. s. 453, where it is said that the commercial law of payment *supra* protest on bills does not apply to notes.

(*h*) Bills of Exchange Act, 1882 (45 & 46 Vict. c. 61), s. 68 (3). See title NOTARIES. For the form of notarial act of honour, see Encyclopædia of Forms, Vol. II., p. 523.

(*i*) Bills of Exchange Act, 1882 (45 & 46 Vict. c. 61), s. 68 (4). Compare *Ex parte Wyld, Re Wyld* (1860), 30 L. J. (BCY.) 10.

(*k*) Bills of Exchange Act, 1882 (45 & 46 Vict. c. 61), s. 68 (2). This will as a rule give preference to a payer for the honour of the drawer, and so in order of priority.

(*l*) Bills of Exchange Act, 1882 (45 & 46 Vict. c. 61), s. 68 (5); *Re Overend, Gurney & Co., Ex parte Swan* (1868), L. R. 6 Eq. 344 (rights); *Goodall* v. *Polhill* (1845), 14 L. J. (C. P.) 146 (duties).

(*m*) Bills of Exchange Act, 1882 (45 & 46 Vict. c. 61), s. 68 (6).

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The bill when paid *supra* protest and delivered up to the payer for honour ceases to be negotiable (*n*).

Duty of holder.

932. The holder of a bill must accept payment *supra* protest when it is offered, otherwise he loses his right of recourse against any party who would have been discharged by such payment (*o*).

SUB-SECT. 6.—*Notice of Dishonour.*

Notice of dishonour.

933. As in the case of dishonour by non-acceptance (*p*), so also in that of dishonour by non-payment, notice of dishonour must be given to the drawer and each indorser (*q*); otherwise the drawer or any indorser to whom such notice is not given is discharged (*r*). But where a bill has been dishonoured by non-acceptance, and due notice of dishonour has been given, it is unnecessary to give notice of a subsequent dishonour by non-payment unless the bill has in the meantime been accepted (*s*).

Rules as to giving notice.

934. The rules for giving due notice of dishonour are the same whether the dishonour has been by non-acceptance or non-payment.

By whom and for whom notice may be given.

Notice of dishonour must be given by or on behalf of the holder, or by or on behalf of an indorser who at the time of giving it is himself liable on the instrument (*a*).

Where given by or on behalf of the holder, it enures for the benefit of all subsequent holders and all prior indorsers who have a right of recourse against the party to whom it is given (*b*).

Where given by or on behalf of an indorser entitled to give notice, it enures for the benefit of the holder (*c*) and all indorsers subsequent to the party to whom notice is given (*d*).

If the instrument is in an agent's hands when dishonoured, the

(*n*) *Re Overend, Gurney & Co., Ex parte Swan* (1868), L. R. 6 Eq. 344.

(*o*) Bills of Exchange Act, 1882 (45 & 46 Vict. c. 61), s. 68 (7).

(*p*) See p. 529, *ante*, where also the effect on the rights of a subsequent holder in due course of want of notice of dishonour by non-acceptance is described.

(*q*) Bills of Exchange Act, 1882 (45 & 46 Vict. c. 61), s. 48. For the definition of dishonour by non-payment, see *ibid.*, s. 47, p. 535, *ante*. For forms of notice of dishonour, see Encyclopædia of Forms, Vol. II., pp. 519—521.

(*r*) Bills of Exchange Act, 1882 (45 & 46 Vict. c. 61), s. 48. Compare *Forster* v. *Jurdison* (1812), 16 East, 105, where the holder of a bill gave notice to the drawer of dishonour, but added that, having reason to believe that it would be taken up on behalf of the acceptor, he would hold it (unless the drawer sent instructions to the contrary) till the end of the week. This was held a sufficient notice to make the drawer liable without further notice at the expiration of the week. Mere knowledge that the bill is dishonoured is not an equivalent to notice (*Cory* v. *Scott* (1820), 3 B. & Ald. 619, distinguishing *Bickerdike* v. *Bollman* (1786), 1 Term Rep. 405; *Caunt* v. *Thompson* (1849), 7 C. B. 400; *Re Fenwick, Stobart & Co.*, [1902] 1 Ch. 507; *Carter* v. *Flower* (1847), 16 M. & W. 749).

(*s*) Bills of Exchange Act, 1882 (45 & 46 Vict. c. 61), s. 48 (2).

(*a*) *Ibid.*, s. 49 (1). Formerly valid notice could only be given by the actual holder at the time of dishonour, but the law has been as it now stands since the decision in *Chapman* v. *Keane* (1835), 3 Ad. & El. 193. A stranger to the instrument, other than an agent of a party entitled to give notice, cannot give notice (*Stewart* v. *Kennett* (1809), 2 Camp. 177).

(*b*) Bills of Exchange Act, 1882 (45 & 46 Vict. c. 61), s. 49 (3).

(*c*) Including, no doubt, a subsequent holder.

(*d*) Bills of Exchange Act, 1882 (45 & 46 Vict. c. 61), s. 49 (4).

agent may give notice either to his principal or to the parties liable on the instrument (*e*), and if he adopts the latter course he may give notice in his own name or in the name of any party entitled to give notice, whether that party is his principal or not (*f*).

How notice may be given

Notice may be given in writing or by personal communication (*g*). When it is in writing it need not be delivered personally. It may be (and usually is) sent through the post, and in that case if it is duly addressed and posted, a fact which it rests with the sender to prove, the sender is absolved from liability for any miscarriage by the post office (*h*).

It may also be sent by special messenger (*i*), but if thereby it reaches its destination on a later day than that on which it would have been delivered in the ordinary course by the post office, it is ineffectual (*k*).

Form of notice.

A written notice need not be signed (*l*), and an insufficient written notice may be supplemented and validated by verbal communication (*m*).

It may be given in any terms which sufficiently identify the instrument and intimate that it has been dishonoured by non-acceptance or non-payment, as the case may be (*n*).

(*e*) Bills of Exchange Act, 1882 (45 & 46 Vict. c. 61), s. 49 (13); *Clode* v. *Bayley* (1843), 12 M. & W. 51.

(*f*) Bills of Exchange Act, 1882 (45 & 46 Vict. c. 61), s. 49 (2); *Lysaght* v. *Bryant* (1850), 19 L. J. (C. P.) 160. Where an agent for one party to an instrument gives notice by mistake on behalf of another party (for whom he is not agent), this does not avoid the notice, but any defence in relation thereto, available against the party in whose name notice was given, may be set up (*Harrison* v. *Ruscoe* (1846), 15 M. & W. 231).

(*g*) Bills of Exchange Act, 1882 (45 & 46 Vict. c. 61), s. 49 (5); *Metcalfe* v. *Richardson* (1852), 11 C. B. 1011; *Prideaux* v. *Criddle* (1869), L. R. 4 Q. B. 455.

(*h*) Bills of Exchange Act, 1882 (45 & 46 Vict. c. 61), s. 49 (15); *Dobree* v. *Eastwood* (1827), 3 C. & P. 250. As to being duly addressed, the notice should be sent to the place of business of the person whom it is desired to notify, or to his residence (*Berridge* v. *Fitzgerald* (1869), L. R. 4 Q. B. 639). It should not in general be addressed simply to Messrs. at some larger place, *e.g.*, London (*Walter* v. *Haynes* (1824), Ry. & M. 149); but where the party in question has so described himself on the instrument, such an address will suffice (*Burmester* v. *Barron* (1852), 17 Q. B. 828). Where notice was by mistake sent to the wrong branch of a large bank, a subsequent telegram correcting the address has been held sufficient (*Fielding & Co.* v. *Corry*, [1898] 1 Q. B. 268). As to due posting, see *Saunderson* v. *Judge* (1795), 2 Hy. Bl. 510).

(*i*) See *Pearson* v. *Crallan* (1805), 2 Smith, K. B. 404.

(*k*) *Darbishire* v. *Parker* (1805), 6 East, 3. See Byles on Bills, 16th ed. p. 231.

(*l*) Bills of Exchange Act, 1882 (45 & 46 Vict. c. 61), s. 49 (7); *Armstrong* v. *Christiani* (1848), 5 C. B. 687; and as to banker giving notice, see *Maxwell* v. *Brain* (1864), 10 L. T. 301.

(*m*) Bills of Exchange Act, 1882 (45 & 46 Vict. c. 61), s. 49 (7); compare *Fielding & Co.* v. *Corry*, *supra*.

(*n*) Bills of Exchange Act, 1882 (45 & 46 Vict. c. 61), s. 49 (5). See the case of *Caunt* v. *Thompson* (1849), 7 C. B. 400, *per* CRESSWELL, J., at p. 411, summing up the previous cases: "In substance these cases seem to establish that in order to make a prior holder responsible he must derive from some person entitled to call for payment information that the bill has been dishonoured, and that the party is in a condition to sue him, from which he may infer that he is responsible." Compare *Hedger* v. *Steavenson* (1837), 2 M. & W. 799, *per* PARKE, B., at p. 805, holding that the notice discloses by a reasonable intendment, and if it would be inferred from it by any man of business, that the

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A misdescription of the instrument does not vitiate the notice unless the party to whom notice is given is in fact misled thereby (*o*).

The return of a dishonoured instrument to the drawer or indorser is in point of form deemed to be a sufficient notice of dishonour (*p*).

When notice necessary.

935. It is unnecessary in order to render the acceptor of a bill or the maker of a note liable thereon that he should be given notice of dishonour (*q*). But in order to render the drawer or any indorser liable it is, as a rule, necessary (*r*).

To whom notice given.

It is for the holder to give notice to such parties as he desires to charge. He may give notice to all prior parties or only to his immediate indorser, and the latter may in turn give notice to his immediate indorser, and so forth until the chain is complete up to the drawer himself (*s*).

But the sequence may be broken at any point by a failure to give notice within the proper time, the effect of which is to release from liability all parties antecedent to the indorser who has thus broken the sequence (*a*). In addition to this, there is the increased difficulty of proving the sending of notice in each case. Hence it is the more prudent course for the holder to give notice to all prior parties at once.

Notice to persons not parties to the instrument.

936. As regards persons who are not parties to the instrument, notice of dishonour is not required in the case of guarantors (*b*), and though it would seem that persons who are liable on the consideration are entitled to some notice (*c*), the rules applying to the

bill had been presented to the acceptor and had not been paid by him, it is sufficient, although it does not so state in terms. See also *Paul* v. *Joel* (1859), 4 H. & N. 355, which points out that the contrary decision in *Solarte* v. *Palmer* (1834), 1 Bing. (N. C.) 194, was a decision on particular facts only, and *Bailey* v. *Porter* (1845), 14 M. & W. 44.

As to what is a sufficient description of the bill, see *Shelton* v. *Braithwaite* (1841), 7 M. & W. 436, which decides that, if it is set up that there is more than one bill to which the notice might apply, proof thereof lies on the defendant. The tendency in modern times seems to be to relax the strictness with which the rules as to notice of dishonour were formerly enforced.

(*o*) Bills of Exchange Act, 1882 (45 & 46 Vict. c. 61), s. 49 (7); *Bromage* v. *Vaughan* (1848), 9 Q. B. 608; *Mellersh* v. *Rippen* (1852), 7 Exch. 578. In *Rowlands* v. *Springett* (1845), 14 L. J. (EX.) 227, a card was left at the house of the drawer of a bill with the name and address of an indorser, and on the back was written "Bill for £30 drawn by S. on W. dishonoured lies due as on the other side." In fact, the indorser was not then the holder, and the bill was not at his address, but the notice was held sufficient.

It is immaterial if in the notice the instrument is described as a note when it should have been a bill (*Stockman* v. *Parr* (1843), 11 M. & W. 809), or *vice versâ* (*Messenger* v. *Southey* (1840), 1 Man. & G. 76); nor is it material if the capacities in which the parties sign the bill are wrongly described (*Mellersh* v. *Rippen*, *supra*).

(*p*) Bills of Exchange Act, 1882 (45 & 46 Vict. c. 61), s. 49 (6).

(*q*) *Ibid.*, ss. 52 (3), 89 (1), (2); *Pearse* v. *Pemberthy* (1812), 3 Camp. 261.

(*r*) Bills of Exchange Act, 1882 (45 & 46 Vict. c. 61), s. 48. For the exceptions, see *ibid.*, s. 50 (2), p. 548, *post*.

(*s*) *Rowe* v. *Tipper* (1853), 13 C. B. 249.

(*a*) See *Harrison* v. *Ruscoe* (1846), 15 M. & W. 231, *per* PARKE, B., at p. 234.

(*b*) *Philips* v. *Astling* (1809), 2 Taunt. 206; *Carter* v. *White* (1883), 25 Ch. D. 666.

(*c*) *Smith* v. *Mercer* (1867), L. R. 3 Exch. 51, where the defendants gave an

notice to be given to parties to the instrument do not perhaps require to be observed in all their strictness in regard to such persons.

Notice to an agent.

937. Notice may be given to any party whom it is sought to render liable by giving it either to the party himself or to his agent in that behalf (*d*).

Where party is dead or bankrupt.

If the drawer or indorser is dead to the knowledge of the party giving notice, the notice must be given to a personal representative of the deceased if there be one and if with reasonable diligence he can be found (*e*). If the drawer or indorser is bankrupt, notice may be given either to the party himself or to his trustee in bankruptcy (*f*).

Where there are two or more parties to be made jointly liable, and they are partners, notice to any one partner is notice to all (*g*), but where they are not partners, notice must be given to each of them, unless one of them has authority to receive such notice for the others (*h*).

approved banker's bill to the plaintiffs for the price of goods supplied. The bill was dishonoured at maturity, but the defendants did not receive notice thereof. On action brought for the price of the goods it was held that both on principle and on authority, if the plaintiffs meant to have recourse to the defendants, they should have given them notice upon finding the bill was dishonoured (*Camidge* v. *Allenby* (1827), 6 B. & C. 373; *Robson* v. *Oliver* (1847), 10 Q. B. 704; *contra*, *Swinyard* v. *Bowes* (1816), 5 M. &. S. 62; *Van Wart* v. *Woolley* (1824), 3 B. & C. 439).

(*d*) Bills of Exchange Act, 1882 (45 & 46 Vict. c. 61), s. 49 (8). In general notice delivered at the business premises of the party is sufficient (*Crosse* v. *Smith* (1813), 1 M. & S. 545; *Allen* v. *Edmundson* (1848), 2 Exch. 719, 723; *Viale* v. *Michael* (1874), 30 L. T. 463; and compare *The Elmville*, [1904] P. 319); and in the case of a non-trader a message verbally given to the wife of the party has been held a valid notice (*Housego* v. *Cowne* (1837), 2 M. & W. 348).

It would appear that, if one person make another his agent for the purpose of indorsing an instrument, that person is also an agent for the purpose of receiving notice of dishonour (*Firth* v. *Thrush* (1828), 8 B. & C. 387, *per* Lord TENTERDEN, C.J., at p. 391); but where the name of a person is inserted by an indorser as a referee in case of need, notice to that person is insufficient (*Re Leeds Banking Co., Ex parte Prange* (1865), L. R. 1 Eq. 1), even if that person is the solicitor of the party whom it is sought to charge.

For the purposes of receiving notice each branch of a bank must be considered as a separate entity (*Clode* v. *Bayley* (1843), 12 M. & W. 51). And see *Fielding & Co.* v. *Corry*, [1898] 1 Q. B. 268.

Where there were three separate companies, and company No. 1 had drawn a bill on company No. 2 to its own order and indorsed it to company No. 3, notice of dishonour to No. 3 must not be taken to be notice to No. 1, although No. 1 and No. 3 had the same secretary, for in the particular facts of the case, the secretary knew of the dishonour as secretary of No. 3 in circumstances in which it was not his duty to communicate it to company No. 1 (*Re Fenwick, Stobart & Co.*, [1902] 1 Ch. 507). And see title AGENCY, Vol. I., pp. 215, 216.

(*e*) Bills of Exchange Act, 1882 (45 & 46 Vict. c. 61), s. 49 (9). Presumably, if there be no personal representative, notice may be sent to the last residence or last place of business of the deceased.

(*f*) *Ibid.*, s. 49 (10); *Ex parte Baker*, *Re Bellman* (1877), 4 Ch. D. 795.

(*g*) So even where the drawer is one of the partners in a firm which accepted a bill the notice received by any member of the firm of the dishonour of the bill is sufficient to bind the partner who drew the bill (*Hills* v. *Thorowgood* (1836), 5 L. J. (K. B.) 214). See p. 492, *ante*.

(*h*) Bills of Exchange Act, 1882 (45 & 46 Vict. c. 61), s. 49 (11). *Quære*

SECT. 12.
Duties of the Holder.

Time of notice.

938. Time is an element of the utmost importance in regard to the due sending of notice of dishonour.

Notice may be given as soon as the instrument is dishonoured (*i*), and it must at all events be given within a reasonable time thereafter (*k*). What is a "reasonable time" must, as in the case of presentment for payment (*l*), be to some extent a matter of fact dependent upon the circumstances of the case (*m*); but in respect of notice of dishonour the rules laid down by law for its determination are much more precise.

In the absence of special circumstances (*n*), notice is not deemed to have been given within a reasonable time unless, (1) in the case of the party to give and the party to receive notice residing in the same place, the notice is given or sent off in time to reach the latter on the day after the dishonour of the instrument (*o*), or (2) in the case of the party to give and the party to receive notice residing in different places, the notice is sent off on the day after the dishonour of the instrument, if there be a post at a convenient hour on that day, or, if there be no such post on that day, then by the next post thereafter (*p*).

As notice of dishonour is one of the things required by the statute to be done in less than three days, non-business days are excluded in reckoning the time (*q*).

whether if the joint parties are not partners notice to one of them would bind even him. See Story, Promissory Notes, 7th ed. s. 308.

(*i*) Bills of Exchange Act, 1882 (45 & 46 Vict. c. 61), s. 49 (12). But if given on the last day of grace no right of action accrues until the following day (*Kennedy* v. *Thomas*, [1894] 2 Q. B. 759).

(*k*) Bills of Exchange Act, 1882 (45 & 46 Vict. c. 61), s. 49 (12); *Hirschfeld* v. *Smith* (1866), L. R. 1 C. P. 340.

(*l*) See p. 531, *ante*.

(*m*) See *The Elmville*, [1904] P. 319. In this case the instrument was dishonoured on Saturday. On Monday the plaintiffs were informed by their bankers of the dishonour. On Tuesday they ascertained that the ship the master of which was the party they desired to charge was at Newcastle. They proceeded to make further inquiries as to the whereabouts of the vessel at Newcastle, and on Thursday sent notice by registered letter to "Captain , master of SS. Elmville, Newcastle-on-Tyne." The notice was actually delivered on the Sunday or Monday. BARNES, J., held (p. 330): "It is simply a question of fact, and I think, having regard to the times I have mentioned and the circumstances of the case, that the plaintiffs acted with due diligence in making inquiries and sending their notice."

(*n*) "Special circumstances" is a term which is no doubt intended to leave the court a wide discretion. It would cover the facts in the case of *The Elmville*, *supra*. It would also cover the facts in a case where an indorsee, who was a Jew, omitted to send out notice on a Jewish festival, on which he was forbidden by his religious law to attend to secular business (*Lindo* v. *Unsworth* (1811), 2 Camp. 602).

(*o*) Bills of Exchange Act, 1882 (45 & 46 Vict. c. 61), s. 49 (12) (a). If, in the ordinary course of post, the notice would reach its destination on the right day, it is sufficient (*Hilton* v. *Fairclough* (1811), 2 Camp. 633), but where an indorser received notice one day and posted it on so late on the following day that the next party in order received it on the day after that, it was held insufficient (*Smith* v. *Mullett* (1809), 2 Camp. 208).

(*p*) Bills of Exchange Act, 1882 (45 & 46 Vict. c. 61), s. 49 (12) (b); *Williams* v. *Smith* (1819), 2 B. & Ald. 496. It is evident that in the case of notice requiring to be sent abroad some days might elapse before a mail steamer sailed.

(*q*) Bills of Exchange Act, 1882 (45 & 46 Vict. c. 61), s. 92. As to what are

Where a party receives due notice of dishonour, he has after the receipt of such notice the same period of time for giving notice to antecedent parties that the holder has after the dishonour (*r*).

Time for passing on notice.

So, too, in the case of an agent for a party to an instrument electing to give notice to his principal instead of to the parties liable on the instrument, the agent must give notice within the same time as if he were the holder, and the principal himself upon receipt of such notice has himself the same time for giving notice as if the agent had been an independent holder (*s*).

Delay etc. in giving notice.

939. Although delay in giving notice of dishonour is excused when the delay is caused by circumstances beyond the control of the party giving notice and is not imputable to his default, misconduct, or negligence, yet when the cause of delay ceases to operate the notice must be given with reasonable diligence (*t*).

When notice dispensed with.

Notice of dishonour is dispensed with altogether where after the exercise of reasonable diligence it cannot be given to or does not reach the drawer or indorser whom it is sought to charge (*a*).

non-business days, see note (*f*), p. 527, *ante*. Where a bill was dishonoured in a place where the post went out at 9.30 a.m., and the day was Saturday, it was held a sufficient notice when sent out by the post on Tuesday morning (*Hawkes* v. *Salter* (1828), 4 Bing. 715). So, too, an indorser who received notice on a Sunday was held to have given sufficient notice by sending it out on Tuesday morning, for he was not obliged to open the letter apprising him of the dishonour on the Sunday (*Wright* v. *Shawcross* (1819), 2 B. & Ald. 501, n.).

(*r*) Bills of Exchange Act, 1882 (45 & 46 Vict. c. 61), s. 49 (14); *Rowe* v. *Tipper* (1853), 13 C. B. 249. In the case of a sequence of holders, each successive notice must be given in due time, so that, if there has between any parties been a failure to give such due notice, a prior party cannot be made liable by showing that, having regard to the total time between the dishonour and the time that such prior party has received notice, he has received it as soon as he should. For where the break in the sequence occurred the party to whom notice was given too late has become a stranger to the bill, and cannot himself give notice to another (*Turner* v. *Leech* (1821), 4 B. & Ald. 451). The fact that a party sent notice to an indorser, which notice, owing to the intervention of a Sunday, might have been sent to reach that indorser a day later than it actually did, does not excuse the latter for not sending notice to the drawers within the required time (*Miers* v. *Brown* (1843), 11 M. & W. 372). See also *Studdy* v. *Beesty* (1889), 60 L. T. 647.

(*s*) Bills of Exchange Act, 1882 (45 & 46 Vict. c. 61), s. 49 (13); *Clode* v. *Bayley* (1843), 12 M. & W. 51; *Goodall* v. *Polhill* (1845), 14 L. J. (C. P.) 146; *Prince* v. *Oriental Bank Corporation* (1878), 3 App. Cas. 325; *Fielding & Co.* v. *Corry*, [1898] 1 Q. B. 268.

(*t*) Bills of Exchange Act, 1882 (45 & 46 Vict. c. 61), s. 50 (1); *The Elmville*, [1904] P. 319 (note (*m*), p. 546, *ante*), where a bill which was drawn by the master of a vessel on the owners to pay for coals supplied was accepted, but dishonoured on being presented for payment, and the delay that took place while the holders were trying to ascertain the then position of the drawer's ship was held excusable. See also *Gladwell* v. *Turner* (1870), L. R. 5 Exch. 59, where all the parties lived in the same place. On the morning after the bill was dishonoured the holder applied to his indorser for information as to the residence of the drawer. His indorser was out at the time, and although he obtained the information from him later in the day and then posted notice to the drawer, the notice did not reach the drawer that day, as it should have done. It was held, however, that he had acted with reasonable diligence, and the notice was therefore sufficient.

(*a*) Bills of Exchange Act, 1882 (45 & 46 Vict. c. 61), s. 50 (2) (a). The question of reasonable diligence is a question of fact in each case (*Bateman* v. *Joseph* (1810), 12 East, 433). Where the drawer told the holder before maturity that he had no regular residence, and would call and see if the bill was honoured by the acceptor, the holder was held absolved from the duty of giving notice

SECT. 12. Duties of the Holder.

Waiver.

Or it may be waived (*b*) expressly (*c*) or by implication (*d*), and either before the time for giving it has arrived (*e*), or after the omission to give it duly (*f*); but an admission of liability by the drawer or an indorser must be made with full knowledge of the facts, or it will not operate as a waiver of notice (*g*).

When notice unnecessary.

940. In the case of the drawer notice of dishonour is not required (*h*)—(1) where the drawer and the drawee are the same person; (2) where the drawee is a fictitious person or a person not having the capacity to contract (*i*); (3) where the drawer is the person to whom the bill is presented for payment (*j*); (4) where the drawee or acceptor is as between himself and the drawer under no obligation to pay the bill (*k*); (5) where the drawer has countermanded payment.

In the case of an indorser it is not required (*l*)—(1) where the

to him (*Phipson* v. *Kneller* (1815), 4 Camp. 285). So, too, where the holder went to the place of business of the drawer and found it shut up, it was held that notice might be dispensed with (*Allen* v. *Edmundson* (1848), 2 Exch. 719), but where the holder failed to find the drawer at the address given, yet was afterwards, but before action brought, informed of a place where the drawer was to be found, he was held not to be absolved from the duty of giving notice (*Studdy* v. *Beesty* (1889), 60 L. T. 647).

(*b*) Bills of Exchange Act, 1882 (45 & 46 Vict. c. 61), s. 50 (2) (b).

(*c*) As to express waiver, see *ibid.*, s. 16 (2). If the drawer or an indorser so waive their right to notice of dishonour, no subsequent party need give them notice, but it does not affect the duty of giving notice to prior parties (*Turner* v. *Leech* (1821), 4 B. & Ald. 451).

(*d*) As to implied waiver, suffering judgment by default in an action by the second indorser is evidence of notice or of a waiver of notice in an action by the first indorser (*Rabey* v. *Gilbert* (1861), 6 H. & N. 536).

(*e*) *Phipson* v. *Kneller* (1815), 4 Camp. 285, where the drawer, who had told the holder that he had no fixed address, promised, shortly before the bill fell due, to call in a few days to see if the bill had been paid; *Brett* v. *Levett* (1811), 13 East, 213, where the drawer told the holder that the bill would not be paid when it fell due.

(*f*) *Mills* v. *Gibson* (1847), 16 L. J. (C. P.) 249; *Woods* v. *Dean* (1862), 3 B. & S. 101, where an indorser who had not received notice of dishonour, on being told that the holder was going to sue him, said he would pay if given time; *Cordery* v. *Colvin* (1863), 14 C. B. (N. S.) 374, where the drawer of a bill, made payable at his own house, repeatedly promised, after its dishonour, to pay it.

(*g*) Thus, where the drawer after the maturity of a bill wrote to the holder admitting liability in ignorance of the fact that it had not been presented, it was held that he had not by his admission dispensed with the duty of presentment or the consequences of the want of it (*Keith* v. *Burke* (1885), Cab. & El. 551); and compare *Pickin* v. *Graham* (1833), 1 Cr. & M. 725.

(*h*) Bills of Exchange Act, 1882 (45 & 46 Vict. c. 61), s. 50 (2) (c). In all these cases the drawer is in the position, usually occupied by the acceptor, of the person primarily liable. In the first and second cases the instrument may be treated at the option of the holder as a bill or note (*ibid.*, s. 5 (2); see p. 464, *ante*).

(*i*) See pp. 474, 489, *ante*.

(*j*) In this case the drawer has first-hand knowledge of the payment or non-payment of the bill (*Caunt* v. *Thompson* (1849), 7 C. B. 400).

(*k*) *I.e.*, where the bill is an accommodation bill (Bills of Exchange Act, 1882 (45 & 46 Vict. c. 61), s. 28); see p. 502, *ante*. Where the drawer of a bill makes it payable at his own house, that fact is evidence that the bill is a mere accommodation bill (*Sharp* v. *Bailey* (1829), 9 B. & C. 44).

(*l*) Bills of Exchange Act, 1882 (45 & 46 Vict. c. 61), s. 50 (2) (d). In these

drawee is a fictitious person or a person not having capacity to contract, and the indorser was aware of the fact at the time that he indorsed the instrument; (2) where the indorser is the person to whom the bill is presented for payment; (3) where the instrument was accepted or made for his accommodation.

SECT. 13.—*Discharge.*

SUB-SECT. 1.—*In General.*

Discharge.

941. Discharge is a term used to denote either the end of the life of the instrument or the release of a party to the instrument from his liability in respect of it. These divergent meanings require to be carefully distinguished. An instrument to which there are several parties is in reality not one contract, but a series of contracts gathered round the principal contract, which is that between the acceptor (or maker) and the party who is the holder (*m*) of the instrument at maturity.

Completion of the principal contract discharges the instrument and the subsidiary contracts also, but completion or dissolution of the subsidiary contracts does not have this effect; it merely releases the parties liable in respect of such subsidiary contracts.

Thus in the case of an accepted bill which has been dishonoured, the laches of the holder or some other party may discharge the drawer and indorsers from their liabilities on the instrument through want of due notice, but the instrument itself is not thereby discharged.

SUB-SECT. 2.—*Discharge of the Instrument.*

Discharge under statute.

942. Discharge of the instrument itself may be caused in a variety of ways.

(1) Payment in due course.

To deal first with those specifically noticed by the statute, an instrument may be discharged by payment in due course to the holder by or on behalf of the drawee or acceptor (if the instrument be a bill) (*n*) or the maker (if it be a note) (*o*).

Now, payment in due course means payment (*p*) at or after the maturity of the instrument, for otherwise a subsequent holder might take the instrument in ignorance of the fact of the payment

cases, again, the indorser is in the position of a party primarily liable on the instrument. But where the indorser for whose accommodation the instrument was accepted or made is not the first indorser, the previous indorsers cannot be sued unless they have had notice of dishonour (*Turner* v. *Samson* (1876), 2 Q. B. D. 23). Even where the indorser gave no value for the instrument, the holder is not absolved from the duty of giving notice of dishonour (*Carter* v. *Flower* (1847), 16 M. & W. 743).

(*m*) *I.e.*, the "holder in due course."

(*n*) For the effect of payment by a stranger, see p. 553, *post*.

(*o*) Bills of Exchange Act, 1882 (45 & 46 Vict. c. 61), ss. 59 (1), 89; *Burbridge* v. *Manners* (1812), 3 Camp. 193, *per* Lord ELLENBOROUGH, C.J., at p. 195: "I agree that a bill paid at maturity cannot be reissued, and that no action can afterwards be maintained upon it by a subsequent indorsee."

(*p*) For the meaning of payment, see *Jones* v. *Broadhurst* (1850), 9 C. B. 173, and title CONTRACT.

SECT. 13. Discharge.

of it (*q*). The payment must be to the holder, and it must be made in good faith and without notice of defect in his title to the instrument (*r*).

Payment to wrong person.

Payment made under a mistake of law cannot be recovered (*s*), but payment made under a mistake of fact can be recovered by the payer if the mistake is discovered and repayment claimed at once (*t*). If, however, the payment was made to an innocent holder, the money paid cannot be recovered back when the position of the holder as a man of business must have been altered, although no legal right may be compromised (*a*).

If the party primarily liable on an instrument pays the amount thereof to a wrong person, who holds it under a forged or unauthorised indorsement, he remains liable for the amount to the true owner, though he may recover the amount from the person whom he has wrongly paid, unless such payee is an innocent person whose position may have been altered in the interval as stated above (*b*).

Payment by banker.

943. A banker is in a somewhat exceptional position, for where a bill is drawn on him payable to order on demand, and he pays the bill in good faith and in the ordinary course of business, it is not incumbent on him to show that any indorsement on the instrument was made by or under the authority of the person whose indorsement it purports to be; and he is deemed to have paid the bill in due course although the indorsement has been forged or made without authority (*c*). But he is expected to know his customer's signature, so that, if he pays a cheque on which his customer's signature as drawer is forged, he cannot charge him with the money paid.

Bills accepted by customer.

A banker is under no obligation to pay bills which his customer has accepted, and does so usually as the result of some special

(*q*) "A payment before the instrument becomes due does not extinguish it any more than if it were merely discounted" (*Burbridge* v. *Manners* (1812), 3 Camp. 193, *per* Lord ELLENBOROUGH, C.J., at p. 195). See also *Morley* v. *Culverwell* (1840), 7 M. & W. 174.

(*r*) Bills of Exchange Act, 1882 (45 & 46 Vict. c. 61), s. 59 (1). A thing is deemed to be done in good faith where it is in fact done honestly whether it is done negligently or not (*ibid.*, s. 90). As to defect of title, see *ibid.*, s. 29 (2), and pp. 499—501, 507, *ante*.

(*s*) *Rogers* v. *Ingham* (1876), 3 Ch. D. 351.

(*t*) *London and River Plate Bank* v. *Bank of Liverpool*, [1896] 1 Q. B. 7; *Imperial Bank of Canada* v. *Bank of Hamilton*, [1903] A. C. 49; and see *Kelly* v. *Solari* (1841), 9 M. & W. 54.

(*a*) The true owner of the instrument can recover from the person wrongly paid the amount paid to him (*Ogden* v. *Benas* (1874), L. R. 9 C. P. 513; *Bobbett* v. *Pinkett* (1876), 1 Ex. D. 368; *London and River Plate Bank* v. *Bank of Liverpool*, *supra*, *per* MATHEW, J., at p. 11). See *Deutsche Bank* (*London Agency*) v. *Beriro & Co.* (1895), 1 Com. Cas. 255.

(*b*) Compare *London and River Plate Bank* v. *Bank of Liverpool*, *supra*.

(*c*) Bills of Exchange Act, 1882 (45 & 46 Vict. c. 61), s. 60, replacing a similar section (s. 19) in the Stamp Act, 1853 (16 & 17 Vict. c. 59), passed to relieve bankers when cheques were for the first time permitted to be drawn payable to order (*Charles* v. *Blackwell* (1877), 2 C. P. D. 151). It is otherwise if the banker has not paid in the ordinary course of business (*Smith* v. *Union Bank of London* (1875), 1 Q. B. D. 31, where the cheque was paid in disregard of its crossing). See title BANKERS AND BANKING, Vol. I., pp. 609 *et seq.*

agreement, express or implied (*d*). If he pays one on which his customer's signature as acceptor is forged, he cannot charge him with the money paid (*e*).

Recovery of money paid.

Money is paid by a banker when his cashier has placed it upon the counter for the purpose of being taken up by the payee. It cannot thereafter be recovered by the banker if he discover that the drawee had insufficient assets (*f*). If, however, the payee of a cheque given in substitution for a bill of exchange on presenting the cheque for payment is induced by a false representation on the part of the banker or his servants to allow money placed upon the counter to be withdrawn, payment has not been made, and the payee is entitled to recover from the acceptor of the bill of exchange (*g*).

Accommodation bill.

944. In the case of an accommodation bill, the party accommodated is in reality the principal debtor, and it therefore follows that a payment in due course by him operates as a discharge of the bill (*h*). The reason is that, although the acceptor of the accommodation bill is on the face of the bill the person primarily liable, he is in fact only a surety for the debt of the party accommodated; and evidence is admissible in an action to show the real relationship of the parties (*i*).

(2) Acceptor becoming holder.

945. Another mode of discharge of the instrument referable to the same principle arises when the acceptor of a bill or maker of a note becomes the holder of it in his own right at or after its maturity (*k*).

946. The instrument is also discharged in certain cases by the action of the holder.

(3) Renunciation by holder.

This occurs where the holder of an instrument either at or after its maturity absolutely and unconditionally renounces his rights against the maker or acceptor (*l*). The renunciation must, however,

(*d*) *Bank of England* v. *Vagliano Brothers*, [1891] A. C. 107, *per* Lord MACNAGHTEN, at p. 157.

(*e*) *Smith* v. *Mercer* (1815), 6 Taunt. 76; *Robarts* v. *Tucker* (1851), 16 Q. B. 560.

(*f*) *Chambers* v. *Miller* (1862), 32 L. J. (C. P.) 30. Compare *Pollard* v. *Bank of England* (1871), L. R. 6 Q. B. 623.

(*g*) *London Banking Corporation, Ltd.* v. *Horsnail* (1898), 3 Com. Cas. 105.

(*h*) Bills of Exchange Act, 1882 (45 & 46 Vict. c. 61), s. 59 (3); *Lazarus* v. *Cowie* (1842), 3 Q. B. 459; *Parr* v. *Jewell* (1855), 16 C. B. 684; *Cook* v. *Lister* (1863), 13 C. B. (N. S.) 543.

(*i*) See *Liquidators of Overend, Gurney & Co.* v. *Liquidators of Oriental Financial Corporation* (1874), L. R. 7 H. L. 348; *Ewin* v. *Lancaster* (1865), 6 B. & S. 571.

(*k*) Bills of Exchange Act, 1882 (45 & 46 Vict. c. 61), s. 61; *Harmer* v. *Steele* (1849), 4 Exch. 1. But this is not so if he is not the holder in his own right (*Nash* v. *De Freville*, [1900] 2 Q. B. 72). "'In his own right' must mean something more than 'not in a representative capacity,' as executor for instance. It could not possibly mean that, if a thief stole the note from the holder and placed it in the possession of the maker at or after maturity, the note should *ipso facto* be satisfied. I think 'in his own right' must mean having a right not subject to that of anyone else, but his own—good against all the world" (*ibid.*, *per* COLLINS, L.J., at p. 89).

(*l*) Bills of Exchange Act, 1882 (45 & 46 Vict. c. 61), s. 62 (1); *Whatley* v. *Tricker* (1807), 1 Camp. 35.

SECT. 13. Discharge.

be in writing (*m*), unless the instrument is actually delivered up to the maker or acceptor (*n*).

(4) Cancellation by holder.

It occurs also where the instrument is cancelled by the holder or his agent in such a way that the cancellation is apparent on the instrument (*o*). It must be cancelled intentionally, for a cancellation made unintentionally or under a mistake or without the authority of the holder is inoperative (*p*). Where, however, the instrument appears to be cancelled, the burden of proof lies on the party who alleges that the cancellation was made unintentionally or under a mistake or without authority (*q*).

(5) Material alteration.

Where an instrument or, if a bill, the acceptance thereon is materially altered without the consent of all the parties liable on the instrument, it is avoided, except as against a party who has himself made, authorised, or assented to the alteration, or subsequent indorsers (*r*). If, however, the alteration is not apparent, a holder in due course may avail himself of the bill as if it had not been altered (*r*). The provisions of the Act make it clear that alteration in many cases amounts to a discharge of parties only, not of the instrument (*s*).

Discharge at common law.

947. Besides these modes of discharge, an instrument may be discharged by any form of discharge which at common law applies to a simple contract for the payment of money and is not inconsistent with the terms of the Bills of Exchange Act, 1882 (*t*).

(*m*) Bills of Exchange Act, 1882 (45 & 46 Vict. c. 61), s. 62 (1); *Re George* (1890), 44 Ch. D. 627, *per* CHITTY, J., at p. 632: "Now it is plain that what must be in writing is an absolute and unconditional renunciation of rights. It is not necessary to put those words in, but that must be the effect of the document. Then the document is not to be a note or memorandum of the renunciation or of an intention to do it, but it must be itself the record of the renunciation." *Quære*, whether it need be signed.

(*n*) Where the renunciation is not in writing, a delivery of the instrument to the legatees or devisees of the maker or acceptor is insufficient to discharge the instrument (*Edwards* v. *Walters*, [1896] 2 Ch. 157). It seems, however, that, had it been delivered up to the executors, that would have been sufficient, because they might have been sued on the instrument as standing in the place of the maker or acceptor.

(*o*) Bills of Exchange Act, 1882 (45 & 46 Vict. c. 61), s. 63 (1); *Ingham* v. *Primrose* (1859), 7 C. B. (N. S.) 82.

(*p*) Bills of Exchange Act, 1882 (45 & 46 Vict. c. 61), s. 63 (3); *Sweeting* v. *Halse* (1829), 9 B. & C. 365.

(*q*) Bills of Exchange Act, 1882 (45 & 46 Vict. c. 61), s. 63 (3); *Raper* v. *Birkbeck* (1812), 15 East, 17; *Novelli* v. *Rossi* (1831), 2 B. & Ad. 757; *Prince* v. *Oriental Bank Corporation* (1878), 3 App. Cas. 325. In the last case a note was marked by the official of a branch bank "Paid" and directions given to credit the payer at another branch, but before the transactions were communicated to anyone outside the bank the circumstances which were to have operated as payment changed, and the note was marked in pencil "Cancelled in error"; it was held upon proof of these facts that the note was not paid. See also *Dominion Bank* v. *Anderson & Co.* (1888), 15 R. (Ct. of Sess.) 408. Where an instrument is allowed by an agent to be cancelled without his principal's authority, the agent is liable for the loss (*Bank of Scotland* v. *Dominion Bank* (*Toronto*), [1891] A. C. 592).

(*r*) Bills of Exchange Act, 1882 (45 & 46 Vict. c. 61), s. 64 (1); see p. 556, *post*.

(*s*) See p. 555, *post*.

(*t*) 45 & 46 Vict. c. 61, s. 97 (2). For such forms of discharge, see title CONTRACT.

SECT. 13. **Discharge.**

Thus lapse of time if sufficiently long, although it does not discharge the instrument, will operate as a bar to an action on it (*a*). (1) Lapse of time.

A release granted to the principal debtor on the instrument (*b*) operates as a discharge, but the release must be at or after maturity, for otherwise, though good between the parties, it will not discharge the instrument (*c*). A release by one of two or more joint holders or a release to one of two or more joint acceptors or makers operates as a valid discharge (*d*). (2) Release.

Accord and satisfaction as between the holder and the principal debtor, whether acceptor or maker, will also discharge the instrument; and this may be the case if the satisfaction be afforded on behalf of the principal debtor by a third party who is a stranger to the instrument (*e*). But an accord and satisfaction, even when afforded by another party to the instrument, does not discharge the principal debtor, unless expressly made on his behalf (*f*). (3) Accord and satisfaction.

Primâ facie the giving of a new instrument in place of an existing one has the effect not of discharging the instrument then existing, but of being a conditional satisfaction of it (*g*), so that if the new instrument is duly paid at maturity the first instrument is discharged (*h*); but if not, then the dormant rights on the first instrument are revived (*i*). Parties to the first instrument who do not assent to its renewal are in any case discharged (*k*). Renewal.

Where there is an agreement to renew, the renewal must be applied for within a reasonable time of the maturity of the instrument, though it need not be before maturity (*l*). Where there is an agreement to renew, it is *primâ facie* an agreement for one renewal only (*m*). Agreement for renewal.

If the consideration on which the instrument to be renewed was Renewal of vitiated bill.

(*a*) *Re Rutherford* (1880), 14 Ch. D. 687, *per* JESSEL, M.R., at p. 692. The note in this case on which it was sought unsuccessfully to prove in the administration of an estate was made in May, 1857. Interest had been paid on it until August, 1858. Thereafter there had been no demand for payment either of principal or interest. If this is the case in respect of a note, it should be so *a fortiori* in the case of a bill, "for a note payable on demand is intended to be a continuing security" (*Brooks* v. *Mitchell* (1841), 9 M. & W. 15, *per* PARKE, B., at p. 18). See title LIMITATION OF ACTIONS.

(*b*) *Foster* v. *Dawber* (1851), 6 Exch. 839; *Liquidators of Overend, Gurney & Co.* v. *Liquidators of Oriental Financial Corporation* (1874), L. R. 7 H. L. 348.

(*c*) See *Ashton* v. *Freestun* (1840), 2 Man. & G. 1; *Dod* v. *Edwards* (1827), 2 C. & P. 602. Compare note (*q*), p. 550, *ante*.

(*d*) *Nicholson* v. *Revill* (1836), 4 Ad. & El. 675.

(*e*) See *Belshaw* v. *Bush* (1851), 11 C. B. 191. As to accord and satisfaction, see title CONTRACT.

(*f*) *Jones* v. *Broadhurst* (1850), 9 C. B. 173.

(*g*) *Kendrick* v. *Lomax* (1832), 2 Cr. & J. 405.

(*h*) *Dillon* v. *Rimmer* (1822), 1 Bing. 100.

(*i*) *Ex parte Barclay* (1802), 7 Ves. 597. Compare *Norris* v. *Aylett* (1809), 2 Camp. 329. As to payment of interest on the first instrument, see *Lumley* v. *Musgrave* (1837), 4 Bing. (N. C.) 9; *Lumley* v. *Hudson* (1837), 4 Bing. (N. C.) 15.

(*k*) Compare *Latham* v. *Chartered Bank of India* (1874), L. R. 17 Eq. 205, *per* BACON, V.-C., at p. 214; *Hall* v. *Cole* (1836), 4 Ad. & El. 577. It is otherwise, however, where the parties are cognisant of the renewal and do not dissent (*Torrance* v. *Bank of British North America* (1873), L. R. 5 P. C. 246).

(*l*) *Maillard* v. *Page* (1870), L. R. 5 Exch. 312.

(*m*) *Innes* v. *Munro* (1847), 1 Exch. 473.

SECT. 13. Discharge.

based was either absent (*n*) or illegal (*o*), the new instrument is vitiated by the same defect in the hands of parties with notice.

So, too, a party who could not have sued upon the first instrument, owing to participation in or cognisance of fraud in connection with it, equally cannot sue upon the new one (*p*). If a party primarily liable on a bill that is materially altered without his knowledge renews the bill in ignorance of the facts, he is not liable on the renewed bill any more than on the old one (*q*).

Discharge of instrument not necessarily discharge of parties.

948. A discharge of the instrument may leave surviving rights of action between the parties to the instrument arising out of the circumstances of the relation of those parties to one another in respect of the instrument, *e.g.*, where there are two or more joint makers of a note, and the note is discharged by payment by one of them, there remains a claim for contribution by that one as against the other (*r*), or where a bill drawn for the accommodation of one party has been discharged by payment by another, there remains a right of action against the party for whose accommodation the bill was drawn on the implied contract of indemnity (*s*).

SUB-SECT. 3.—*Discharge of Parties.*

Discharge of parties.

949. One or more of the parties to an instrument may be discharged by circumstances that do not operate as a discharge of the instrument. The cases specifically noticed by the statute are—

Qualified acceptance.

(1) Where the holder has taken a qualified acceptance without the authority or subsequent assent of the drawer or indorsers, they are thereby discharged (*t*).

Non-presentment etc.

(2) Where the provisions in regard to due presentment for acceptance and payment and due notice of dishonour are not complied with, the drawer and indorsers are discharged (*a*).

Payment by indorser.

(3) Where the instrument is paid by a drawer or indorser. If the instrument is paid by an indorser, the liability of the indorser to

(*n*) *Southall* v. *Rigg* (1851), 11 C. B. 481; *Edwards* v. *Chancellor* (1888), 52 J. P. 454.

(*o*) *Chapman* v. *Black* (1819), 2 B. & Ald. 588. But where the consideration, though illegal at the time the first instrument was given, has ceased to be so in the interval, the new instrument can be recovered on (*Flight* v. *Reed* (1863), 1 H. & C. 703).

(*p*) *Lee* v. *Zagury* (1817), 8 Taunt. 114. But where a party accepted a bill, and a bill exactly similar, whereon his signature as acceptor was forged, was presented to him by a holder in due course for payment, and he thereupon gave a new bill for the same amount, it was held that he was liable on the new bill (*Mather* v. *Lord Maidstone* (1856), 18 C. B. 273).

(*q*) *Bell* v. *Gardiner* (1842), 4 Man. & G. 11.

(*r*) *Harmer* v. *Steele* (1849), 4 Exch. 1, *per cur.* at p. 13.

(*s*) *Stratton* v. *Mathews* (1848), 3 Exch. 48. He is in the position of a surety, and has all a surety's rights (*Bechervaise* v. *Lewis* (1872), L. R. 7 C. P. 372). Moreover, where two persons become parties to a bill for the accommodation of a third, and one of the two is compelled to pay the amount of the bill, the relation *inter se* of the two is that of co-sureties, and the one who has paid is entitled to call upon his companion for reimbursement without regard to their respective liabilities as stated on the face of the bill (*Reynolds* v. *Wheeler* (1861), 30 L. J. (C. P.) 350). See, as to sureties generally, title GUARANTEE.

(*t*) Bills of Exchange Act, 1882 (45 & 46 Vict. c. 61), s. 44 (2); and see p. 488, *ante*.

(*a*) *Ibid.*, ss. 42, 45, 48; and see pp. 526, 530, 542, *ante*.

his indorsee and all subsequent parties is extinguished, and he resumes the rights which he possessed as a holder before he indorsed the instrument as regards the acceptor or maker and other antecedent parties (*b*). He may therefore at his discretion strike out his own and subsequent indorsements and again negotiate the instrument (*c*).

By drawer.

The effect is the same in the case of a bill payable to drawer's order which is paid by the drawer, for then the drawer is also the first indorser (*d*).

But where the instrument is a bill drawn payable to a third party, payment thereof by the drawer, though it releases him from liability and entitles him to enforce payment against the acceptor (*e*), does not entitle him to reissue the bill (*f*), for that would be to vary the contract by substituting himself for the payee and thereby materially to alter the bill.

Accommodation bill.

Payment of an accommodation bill by the drawer or indorser for whose accommodation it was drawn discharges the instrument (*g*).

Renunciation by holder.

(4) Where the liabilities of any party to an instrument are absolutely and unconditionally renounced by the holder before, at, or after maturity (*h*). In such case that party and subsequent parties, but not prior parties, are released unless the instrument thereafter passes into the hands of a holder in due course who has no notice of the renunciation (*i*). The renunciation must be in writing, but apparently need not appear upon the instrument (*k*).

Cancellation of signature.

(5) Where the signature of any party to an instrument is intentionally cancelled by the holder or his agent. In such a case the party whose signature is cancelled, and any subsequent party to whom that party is liable, is released from his liability on the instrument (*l*).

Material alteration.

(6) Where an instrument or, if a bill, the acceptance thereon is materially altered without the assent of all the parties liable on it. In this case the bill is avoided as regards all the parties except anyone who has himself made, authorised, or assented to the alteration, and those who have become parties to the instrument subsequent to the material alteration (*m*). But where the alteration,

(*b*) Bills of Exchange Act, 1882 (45 & 46 Vict. c. 61), s. 59 (2) (b).

(*c*) *Ibid.*

(*d*) *Ibid.*; *Jones* v. *Broadhurst* (1850), 9 C. B. 173; *Kemp* v. *Balls* (1854), 10 Exch. 607.

(*e*) Bills of Exchange Act, 1882 (45 & 46 Vict. c. 61), s. 59 (2) (a).

(*f*) *Ibid.*, s. 59 (2) (a); *Williams* v. *James* (1850), 15 Q. B. 498, *per* PATTESON, J., at p. 505.

(*g*) See p. 551, *ante*.

(*h*) Bills of Exchange Act, 1882 (45 & 46 Vict. c. 61), s. 62 (2); and see p. 551, *ante*.

(*i*) *Ibid.*, s. 62 (2). Compare *De la Torre* v. *Barclay* (1814), 1 Stark. 7.

(*k*) See Bills of Exchange Act, 1882 (45 & 46 Vict. c. 61), s. 62 (1), as to requisites of renunciation; *Abrey* v. *Crux* (1869), L. R. 5 C. P. 37; *Edwards* v. *Walters*, [1896] 2 Ch. 157.

(*l*) Bills of Exchange Act, 1882 (45 & 46 Vict. c. 61), s. 63 (2). As to unintentional cancellation and the burden of proof in such case, see *ibid.*, s. 63 (3), and p. 552, *ante*.

(*m*) *Ibid.*, s. 64 (1); *Master* v. *Miller* (1793), 2 Hy. Bl. 140, 1 Smith, L. C., 11th ed. 767; *Hamelin* v. *Bruck* (1846), 9 Q. B. 306. The alteration has the same effect upon the parties to the instrument if the alteration is made by one who is not a party to it (*Davidson* v. *Cooper* (1844), 13 M. & W. 343).

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although material, is not apparent, a holder in due course in whose hands the instrument is may avail himself of the instrument as if it had not been altered, and may enforce payment of it according to its original tenour (*n*).

The question of the materiality of an alteration is a question of law (*o*). It does not matter whether the parties ever benefited or not (*p*) by the alteration.

Alterations declared material by statute.

The following alterations are specifically declared to be material (*q*) :—

Any alteration of (1) the date (*r*); (2) the sum payable (*s*); (3) the time of payment (*t*); (4) the place of payment (*a*), or the addition of a place of payment where none is mentioned by the acceptor, without the acceptor's assent (*b*).

Alterations held to be material.

Other alterations which have been held to be material are the addition (*c*) or alteration (*d*) of a rate of interest, the insertion of a particular rate of exchange (*e*), the addition of the name of a new maker to a joint and several note (*f*), or the elimination of the name of an existing maker (*g*), and the conversion of a joint note into a joint and several note (*h*).

(*n*) Bills of Exchange Act, 1882 (45 & 46 Vict. c. 61), s. 64 (1); *Scholfield* v. *Earl of Londesborough*, [1896] A. C. 514 (where the drawer altered an acceptance for £500 to one for £3,500, and a holder in due course was permitted to recover £500 only); *Bank of Montreal* v. *Exhibit and Trading Co.* (1906), 11 Com. Cas. 250 (where the word "Limited" was added to the name of the makers of a promissory note by an indorser); *Imperial Bank of Canada* v. *Bank of Hamilton*, [1903] A. C. 49. In *Colonial Bank of Australasia, Ltd.* v. *Marshall*, [1906] A. C. 559, cheques drawn by three executors were so drawn that one of the executors was enabled to fill up the cheques for larger amounts without the fraudulent alteration being apparent. The paying bank claimed to debit the account with the full amount of the altered cheques. It was held that they could not do so. See also *Smith* v. *Prosser*, [1907] 2 K. B. 738, *per* VAUGHAN WILLIAMS, L.J. at p. 746; *Lewes Sanitary Steam Laundry Co.* v. *Barclay Bevan & Co.* (1906), 11 Com. Cas. 255. These cases seem finally to dispose of *Young* v. *Grote* (1827), 4 Bing. 253, where it was held that if a cheque was so carelessly drawn as to enable it to be tampered with without the alteration being apparent, the drawer was estopped by his own negligence from setting up the alteration. See title BANKERS AND BANKING, Vol. I., p. 616.

(*o*) *Vance* v. *Lowther* (1876), 1 Ex. D. 176; *Suffell* v. *Bank of England* (1882), 9 Q. B. D. 555, *per* BRETT, L.J., at p. 568: "Any alteration seems to me material which would alter the business effect of the instrument if used for any ordinary business purpose."

(*p*) *Gardner* v. *Walsh* (1855), 5 E. & B. 83, 89.

(*q*) Bills of Exchange Act, 1882 (45 & 46 Vict. c. 61), s 64 (2).

(*r*) *Outhwaite* v. *Luntley* (1815), 4 Camp. 179; *Vance* v. *Lowther* (1876), 1 Ex. D. 176; *Hirschman* v. *Budd* (1873), L. R. 8 Exch. 171.

(*s*) *Hamelin* v. *Bruck* (1846), 9 Q. B. 306; *Scholfield* v. *Earl of Londesborough*, [1896] A. C. 514; *Imperial Bank of Canada* v. *Bank of Hamilton*, [1903] A. C. 49.

(*t*) *Outhwaite* v. *Luntley*, *supra*; *Vance* v. *Lowther*, *supra*; *Alderson* v. *Langdale* (1832), 3 B. & Ad. 660.

(*a*) *Tidmarsh* v. *Grover* (1813), 1 M. & S. 735.

(*b*) *Cowie* v. *Halsall* (1821), 4 B. & Ald. 197; *Burchfield* v. *Moore* (1854), 23 L. J. (Q. B.) 261. *Aliter* where the acceptor assents (*Walter* v. *Cubley* (1833), 2 Cr. & M. 151).

(*c*) *Warrington* v. *Early* (1853), 23 L. J. (Q. B.) 47.

(*d*) *Sutton* v. *Toomer* (1827), 7 B. & C. 416.

(*e*) *Hirschfeld* v. *Smith* (1866), L. R. 1 C. P. 340.

(*f*) *Gardner* v. *Walsh* (1855), 5 E. & B. 83.

(*g*) *Mason* v. *Bradley* (1843), 11 M. & W. 590; *Nicholson* v. *Revill* (1836), 4 Ad. & El. 675.

(*h*) *Perring* v. *Hone* (1826), 4 Bing. 28.

A crossing of a cheque as authorised by the statute becomes a material part of the cheque, so that an obliteration or alteration of the crossing or an addition thereto, when not authorised, is a material alteration of the cheque (*i*). Alteration of crossing.

On the other hand, the following alterations have been held to be immaterial: the addition of a wrong date for the maturity of the instrument (*k*), the elimination of the words "or order" in an instrument payable to order (*l*), the conversion of an instrument payable to the payee or order into one payable to him or bearer (*m*), or the alteration of the drawee's style when wrongly stated in the bill to his true style as signed by him in his acceptance (*n*). Immaterial alterations.

The conversion of a blank indorsement into a special indorsement is sanctioned by statute (*o*).

Though the materiality or otherwise of an alteration is thus a matter of law, the circumstances in which the alteration took place are a matter of fact; and where an instrument appears to have been altered, it rests with the party who seeks to enforce the instrument to give some evidence of what those circumstances were (*p*).

A holder who cannot recover on an instrument that has been materially altered cannot recover on the consideration which he gave for it (*q*), unless the alteration was made without his knowledge and before he took the instrument (*r*), or, where the alteration was made while in his possession, unless it was not made fraudulently, and the party from whom he seeks payment would have had no right of recourse if the alteration had not been made (*s*). Position of holder of altered instrument.

950. Besides these grounds for discharge of one or more of the parties, the giving of time to the acceptor or maker may discharge those secondarily liable. Giving time.

Where there is a binding agreement to give time, all the persons secondarily liable are discharged, and the acceptor or maker remains the sole party against whom there is a right of action (*t*), unless the agreement by its terms reserves the rights of

(*i*) Bills of Exchange Act, 1882 (45 & 46 Vict. c. 61), s. 78.

(*k*) *Fanshawe* v. *Peet* (1857), 26 L. J. (EX.) 314.

(*l*) Compare *Meyer & Co.* v. *Decroix, Verley et Cie.*, [1891] A. C. 520.

(*m*) *Atwood* v. *Griffin* (1826), 2 C. & P. 368.

(*n*) *Farquhar* v. *Southey* (1826), Mood. & M. 14. Compare *Bank of Montreal* v. *Exhibit and Trading Co.* (1906), 11 Com. Cas. 250, where the question whether the addition of the word "Limited" to the name of the makers of a promissory note was material was not decided.

(*o*) Bills of Exchange Act, 1882 (45 & 46 Vict. c. 61), s. 34 (4). See p. 505, *ante*.

(*p*) *Knight* v. *Clements* (1838), 8 Ad. & El. 215; *Clifford* v. *Parker* (1841), 2 Man. & G. 909. Where a note originally in the form "Pay or other" was altered to "Pay or order," and the person who prepared the note stated in evidence that he could not say if the alteration was in his handwriting, but that it was what he ought to have written, the evidence was held sufficient (*Cariss* v. *Tattersall* (1841), 2 Man. & G. 890).

(*q*) *Alderson* v. *Langdale* (1832), 3 B. & Ad. 660.

(*r*) *Burchfield* v. *Moore* (1854), 23 L. J. (Q. B.) 261.

(*s*) *Alderson* v. *Langdale, supra*; Chalmers, Bills of Exchange, 6th ed. p. 220.

(*t*) See title GUARANTEE; and compare *Philpot* v. *Briant* (1828), 4 Bing. 717; *Polak* v. *Everett* (1876), 1 Q. B. D. 669. An agreement made with any other party than the maker or acceptor does not discharge the other parties (*Fraser* v. *Jordan* (1857), 26 L. J. (Q. B.) 288).

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the holder against such parties (*a*). But mere delay in enforcing payment against the acceptor or maker does not have this result (*b*).

Discharge of one joint debtor.

951. Where persons are jointly liable on an instrument the discharge of one operates as a discharge of them all, whether they are principals—as, *e.g.*, the joint makers of a note (*c*)—or merely sureties (*d*); and if they are jointly and severally liable, a discharge of one of them *primâ facie* operates as a discharge of the others (*e*).

Lapse of time.

952. If it is desired to bring an action to enforce payment against any party liable on an instrument, and the action is not brought within six years from the time at which the right of action accrued, the right of action may be barred by the Statute of Limitations (*f*).

The date at which the time begins to run, in the case of a negotiable instrument, depends not upon its acquisition by a holder, but upon the contract entered into by the parties liable.

Acceptor.

In the case of the acceptor of a bill it runs from the maturity (*g*) of the bill, unless (1) the bill was accepted subject to the condition of presentment (*h*), in which case time begins to run from the date of presentment, or (2) the bill was accepted after maturity (*i*), in which case, it seems, time will run from the date of such acceptance.

Where, however, a blank signature has been given, the statute begins to run from the time when the instrument is issued in a complete form (*k*), though as between immediate parties and parties with notice the instrument must be filled up within a reasonable time (*l*).

Maker.

In the case of a note also time runs for the maker from the maturity of the note (*m*). But where the instrument is payable on demand, then time is calculated from the date of the instrument (*n*),

(*a*) *Oriental Financial Corporation* v. *Overend, Gurney & Co.* (1871), 7 Ch. App. 142.

(*b*) But the agreement itself may by its terms require payment to be demanded within a certain time, and if this is exceeded, the parties will be discharged (*Lawrence* v. *Walmsley* (1862), 31 L. J. (C. P.) 143).

(*c*) *King* v. *Hoare* (1844), 13 M. & W. 494.

(*d*) *Ward* v. *National Bank of New Zealand* (1883), 8 App. Cas. 755.

(*e*) *Ibid.*, at p. 764; *Re a Debtor*, [1901] 2 K. B. 642. It is otherwise if there be a reservation of rights, or in the case of discharge by operation of law (*Ex parte Jacobs*, *Re Jacobs* (1875), 10 Ch. App. 211).

(*f*) See title LIMITATION OF ACTIONS; and compare *Emery* v. *Day* (1834), 1 Cr. M. & R. 245.

(*g*) As to meaning of maturity, see pp. 475 *et seq.*, *ante*. In the case of a bill payable at a fixed time after sight or demand, a demand is presumed to have been made if interest is paid on the bill and receipt thereof acknowledged, and time will run having regard to the date of such acknowledgment (*Re Rutherford* (1880), 14 Ch. D. 687).

(*h*) See Bills of Exchange Act, 1882 (45 & 46 Vict. c. 61), s. 52 (2), and p. 530, *ante*.

(*i*) See *ibid.*, s. 10 (2), and p. 486, *ante*.

(*k*) *Montagu* v. *Perkins* (1853), 22 L. J. (C. P.) 187.

(*l*) See Bills of Exchange Act, 1882 (45 & 46 Vict. c. 61), s. 20 (2); *Montagu* v. *Perkins*, *supra*; and compare *Temple* v. *Pullen* (1853), 8 Exch. 389.

(*m*) *Fryer* v. *Roe* (1852), 12 C. B. 437; and see note (*g*), *supra*. Where there is a covenant that the principal may be called in on failure to pay an instalment of interest, time will run from the date of such failure (*Reeves* v. *Butcher*, [1891] 2 Q. B. 509).

(*n*) *Norton* v. *Ellam* (1837), 2 M. & W. 461.

unless indeed the instrument was issued at a later date than appears upon its face, in which case time runs from the date of issue (*o*).

Drawer etc.

In the case of the drawer of a bill or the indorser of a bill or note time begins to run from the date of receipt of notice of dishonour (*p*). It is presumed that where notice of dishonour is excused time will begin to run from the date of the dishonour (*q*).

If a bill is dishonoured by non-acceptance, a future dishonour by non-payment does not create a fresh right of action so as to make time run from the latter date (*r*).

Collateral transactions.

But when a cheque is given not in payment of a debt, but as a loan, time begins to run against the lender from the time when the cheque is cashed, for the action is not on the instrument, but is an action for the recovery of the loan (*s*). And in the same way with any other instrument where the action is not on the instrument itself, but to enforce an obligation collateral to, although arising out of, the transaction for which the instrument was given, time will begin to run from the date when the particular obligation arises (*a*).

Disability etc.

The date at which time will begin to run may be postponed by circumstances peculiar to the holder, *e.g.*, if the holder is under a disability to sue (*b*), or if, the holder having died intestate before maturity of the instrument, an administrator is not at once appointed (*c*).

Revival of right.

The right of action against any party liable on an instrument may, as in the case of any other contract, be renewed or revived by an admission by that party of his liability, by an unconditional promise to pay, or by a conditional promise to pay coupled with evidence that the condition has been performed (*d*).

(*o*) *Savage* v. *Aldren* (1817), 2 Stark. 232.

(*p*) *Re Boyse, Crofton* v. *Crofton, Canonge's Claim* (1886), 33 Ch. D. 612, *per* NORTH, J., at p. 622. Compare *Webster* v. *Kirk* (1852), 17 Q. B. 944; *Castrique* v. *Bernabo* (1844), 6 Q. B. 498; *Re Bethell* (1887), 34 Ch. D. 561, in which last case, however, it was held that if a cheque is given undated on the understanding that the drawer will advise the payee as soon as there are funds to meet it, and that the payee will then present it, time will begin to run as soon as the payee receives an intimation that funds will not be forthcoming.

(*q*) Compare *Kennedy* v. *Thomas*, [1894] 2 Q. B. 759.

(*r*) *Whitehead* v. *Walker* (1842), 9 M. & W. 506.

(*s*) *Garden* v. *Bruce* (1868), L. R. 3 C. P. 300.

(*a*) *E.g.*, where the acceptor of a bill drawn for the drawer's accommodation is compelled to pay the bill, the time within which he must bring his action for indemnity against the drawer runs from the date of his payment of the bill (*Reynolds* v. *Doyle* (1840), 1 Man. & G. 753). Where several persons are jointly liable on an instrument, an action by one of them who has paid it for contribution from the others must be begun within six years from his payment of the bill (*Davies* v. *Humphreys* (1840), 6 M. & W. 153).

(*b*) *Scarpellini* v. *Atcheson* (1845), 7 Q. B. 864.

(*c*) *Murray* v. *East India Co.* (1821), 5 B. & Ald. 204.

(*d*) *Re River Steamer Co., Mitchell's Claim* (1871), 6 Ch. App. 822, *per* MELLISH, L.J., at p. 828, citing JERVIS, C.J., as approved by Lord CAMPBELL, C.J., in *Everett* v. *Robertson* (1858), 1 E. & E. 16; *Bourdin* v. *Greenwood* (1871), L. R. 13 Eq. 281. Compare *Green* v. *Humphreys* (1884), 26 Ch. D. 474; *Langrish* v. *Watts* (1903), 72 L. J. (K. B.) 435. Part payment may be such an acknowledgment, but unless it amounts to the admission that more is due, it cannot operate as an admission of any still existing debt (*Tippets* v. *Heane* (1834), 1 Cr. M. & R. 252). See generally, title LIMITATION OF ACTIONS.

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The admission or acknowledgment, if made to the then holder of the instrument, will enure for the benefit of a subsequent holder, but not if it is made to one who has ceased to be holder (*e*).

SECT. 14.—*Bills in a Set.*

Bills in a set.

953. Bills of exchange may be drawn in sets of two, three, or more parts, three being the most usual number (*f*). This practice is common in the case of foreign bills, and indeed by the law of some countries it is compulsory. The object is to avoid delays and inconveniences which might otherwise arise from the loss, or mislaying, or miscarriage of the bill, and also to enable the holder to transmit the same by different conveyances to the drawee, so as to ensure the most prompt and speedy presentment for acceptance and payment (*g*).

Each part should be numbered and contain a reference to every other part of the set and a condition that it will be payable only so long as all the others are unpaid (*f*).

The whole of the parts constitute in such case one bill (*h*). Each part is signed by the drawer, and all the parts should be delivered to the person in whose favour the bill is drawn, unless one part is forwarded to the drawee for acceptance (*i*).

Rights and duties of holder.

954. A holder who negotiates a bill drawn in a set is bound to deliver all the parts in his possession, but a negotiation of one part by him does not warrant his possession of the other parts or make him liable to deliver them if not in his possession (*k*).

Where he indorses two or more parts to different persons, he is liable on every such part; and every indorser subsequent to him is liable on the part he has himself indorsed as if the said parts were separate bills (*l*).

But, as between the different holders, the holder whose title first accrues is deemed to be the true owner of the bill (*m*). The true owner may possibly be entitled to recover the other parts even from a holder of them in due course (*n*), but in any case the rights of a person who in due course accepts or pays the part first presented to him are preserved (*o*).

(*e*) See Byles on Bills, 16th ed. p. 370. See *Stamford, Spalding, and Boston Banking Co.* v. *Smith*, [1892] 1 Q. B. 765.

(*f*) For form of bills in a set, see Encyclopædia of Forms, Vol. II., p. 511.

(*g*) Story, Bills of Exchange, 6th ed. s. 66.

(*h*) Bills of Exchange Act, 1882 (45 & 46 Vict. c. 61), s. 71 (1). Compare *Société Générale* v. *Metropolitan Bank* (1873), 27 L. T. 849; *Davison* v. *Robertson* (1815), 3 Dow, 218.

(*i*) Story, Bills of Exchange, 6th ed. s. 67.

(*k*) *Pinard* v. *Klockman* (1863), 32 L. J. (Q. B.) 82. Where, however, the payee of bills drawn in a set contracted to deliver them up, it was held that he had not fulfilled his contract by delivering one part of each (*Kearney* v. *West Granada etc. Mining Co.* (1856), 26 L. J. (EX.) 15).

(*l*) Bills of Exchange Act, 1882 (45 & 46 Vict. c. 61), s. 71 (2).

(*m*) *Ibid.*, s. 71 (3).

(*n*) See *Holdsworth* v. *Hunter* (1830), 10 B. & C. 449; *Lang* v. *Smyth* (1831), 7 Bing. 284; *Perreira* v. *Jopp* (1793), 10 B. & C. 450, n.

(*o*) Bills of Exchange Act, 1882 (45 & 46 Vict. c. 61), s. 71 (3).

SECT. 14. Bills in a Set.

955. The drawee may write his acceptance on any part, but he should do so on one part only, otherwise if two or more parts bearing his acceptance get into the hands of different holders in due course he is liable on every such part as if it were a separate bill (*p*).

Rights and duties of drawee.

Where the bill or a part of it is presented to the acceptor for payment, he should require the part which he has accepted to be handed over to him on payment of the bill, for otherwise, if the part bearing his acceptance is outstanding at maturity in the hands of a holder in due course, he is liable on it (*q*). Subject to this, however, the payment or other discharge of one part involves the discharge of the whole bill (*r*).

SECT. 15.—*Conflict of Laws.*

Conflict of laws.

956. Inasmuch as bills of exchange, cheques, and (though to a lesser extent) promissory notes are more than local in their character and use, it follows that they may be in the course of their existence subject to the laws of foreign countries, which laws may, and in many cases do, differ from the law of England. This fact is recognised to some extent in the distinction between foreign and inland instruments (*s*). But the special provisions of the statute so far noticed, *e.g.*, as to the protest of foreign bills (*t*) and the measure of damages in the event of dishonour of foreign instruments (*u*), are more in the nature of practical expedients suited to the convenience of special cases than attempts to meet the difficulty of a conflict of laws.

It is therefore of the highest importance to determine by what principles the rights and liabilities of the various parties are to be governed where the laws of more than one country are concerned (*x*). The principle adopted is in general that the *lex loci contractus* should prevail.

Law applicable to requisites of form.

957. The validity of an instrument as regards requisites in form is determined by the law of the place of issue (*a*).

But to this general rule certain exceptions are admitted in the interests of persons who become parties to a foreign instrument in this country. Thus an instrument issued abroad is not invalid in this country by reason only that it is not stamped in accordance with the law of the place of issue (*b*).

And where it conforms as regards requisites in form to the law of this country it may for the purpose of enforcing payment thereof

(*p*) Bills of Exchange Act, 1882 (45 & 46 Vict. c. 61), s. 71 (4). See *Ralli* v. *Dennistoun* (1851), 6 Exch. 482; *Holdsworth* v. *Hunter* (1830), 10 B. & C. 449.

(*q*) Bills of Exchange Act, 1882 (45 & 46 Vict. c. 61), s. 71 (5).

(*r*) *Ibid.*, s. 71 (6).

(*s*) *Ibid.*, ss. 4, 83 (4), p. 475, *ante*.

(*t*) *Ibid.*, s. 51 (2), p. 536, *ante*.

(*u*) *Ibid.*, s. 57 (2), p. 525, *ante*.

(*x*) For the conflict of laws in general, see title CONFLICT OF LAWS.

(*a*) Bills of Exchange Act, 1882 (45 & 46 Vict. c. 61), s. 72 (1). The place of issue is the place at which the instrument is first delivered complete in form, not the place where it is signed (*Chapman* v. *Cottrell* (1865), 34 L. J. (EX.) 186). See also Bills of Exchange Act, 1882 (45 & 46 Vict. c. 61), s. 2, p. 463, *ante*.

(*b*) Bills of Exchange Act, 1882 (45 & 46 Vict. c. 61), s. 72 (1) (a). See *Wynne* v. *Jackson* (1826), 2 Russ. 351.

SECT. 15. Conflict of Laws.

be treated as valid as between all persons who negotiate, hold, or become parties to it in this country (*c*).

These exceptions are made in the interest of the credit and negotiability of such instruments, because traders and others in this country cannot be expected to be conversant with the laws of other countries in regard to stamps, indorsements etc.; and to make the indorsee to whom a foreign instrument was negotiated in this country take the instrument at the peril of a flaw in the form of the instrument according to the law of the place of issue would be to restrict the negotiability of such an instrument in this country, to the detriment of trade.

Law applicable to drawing and other subsidiary contracts.

958. In general the validity of the drawing, making, indorsement, acceptance, or acceptance *supra* protest of an instrument, as regards requisites in form and interpretation, is determined by the law of the place where such contract is made (*d*); but where an inland instrument (*e*) is indorsed abroad the indorsement is to be interpreted as regards the payer by the law of this country (*f*).

As regards the payer, this rule perhaps contemplates the place of making the contract and the place of payment of the instrument being identical; if that be so, a qualification must be made where the places of contract and of payment are different. Where such is the case the interpretation of the contract would seem to be determined by the law of the place of payment (*g*).

So, too, in the event of dishonour, the extent of the liability of each party to the instrument is governed by the law of the place at which he undertakes to pay it (*h*).

(*c*) Bills of Exchange Act, 1882 (45 & 46 Vict. c. 61), s. 72 (1) (b); *Re Marseilles Co.* (1885), 30 Ch. D. 598.

(*d*) Bills of Exchange Act, 1882 (45 & 46 Vict. c. 61), s. 72 (1), (2); *Embiricos* v. *Anglo-Austrian Bank*, [1905] 1 K. B. 677, where a bill was taken in good faith and without negligence by an Austrian bank under a forged indorsement in Austria and forwarded to London by the bank as holder to the defendants for collection, and the validity of the bank's title to the bill was held to be determined by Austrian, not by English, law. See *Allen* v. *Kemble* (1848), 6 Moo. P. C. C. 314; *Bradlaugh* v. *De Rin* (1868), L. R. 3 C. P. 538, reversed on other grounds (1870), L. R. 5 C. P. 473; *Horne* v. *Rouquette* (1878), 3 Q. B. D. 514. So where the time for presentment for payment is extended as regards the acceptor by a moratorium (see note (*d*), pp. 533, 534, *ante*), the indorser remains liable in spite of the delay (*Rouquette* v. *Overmann* (1875), L. R. 10 Q. B. 525).

(*e*) For definition of inland instrument, see Bills of Exchange Act, 1882 (45 & 46 Vict. c. 61), s. 4 (1), p. 475, *ante*.

(*f*) *Ibid.*, s. 72 (2); *Lebel* v. *Tucker* (1867), L. R. 3 Q. B. 77.

(*g*) *Robinson* v. *Bland* (1760), 1 Wm. Bl. 234, 256, *per* Lord MANSFIELD at p. 258: "The general rule established *ex comitate et jure gentium* is that the place where the contract is made, and not where the action is brought, is to be considered in expounding and enforcing the contract. But this rule admits of an exception where the parties at the time of making the contract had a view to a different kingdom. Huberus says (Præl. 1, tit. 3, p. 34): 'Contracts are to be considered according to the place where they are to be executed.' As therefore the bill in the present case is made payable in England, it is entirely an English transaction and to be governed by the local law." See also *Moulis* v. *Owen*, [1907] 1 K. B. 746, where in the case of a cheque given in the French colony of Algiers, but payable in London, it was held that the contract was to be interpreted by English law (the court being unanimous on this point), and that, the cheque being given for a gambling transaction illegal in this country, payment of the cheque could not be enforced by English law.

(*h*) *Cooper* v. *Earl of Waldegrave* (1840), 2 Beav. 282, where it was held that, a

SECT. 15. Conflict of Laws.

Scotland.

959. In Scotland, where the drawee of a bill has in his hands funds available for the payment thereof, the bill operates as an assignment of the sum for which it is drawn in favour of the holder from the time when the bill is presented to the drawee (*i*). Therefore where a bill is payable in Scotland this rule must be regarded in interpreting the contract.

Referee in case of need.

960. Again, where the name of a referee in case of need has been inserted abroad (*k*), the holder here has it in his option whether to apply to him or not; but, inasmuch as in some countries application to the referee in case of need is obligatory, it is the more prudent course for a holder in this country to exercise his option in favour of such an application.

Date.

961. Where an instrument is drawn or made in one country and payable in another, the due date thereof is determined according to the law of the place where it is payable (*l*).

Validity of transfer.

Where an instrument is transferred in a foreign country, and different persons claim it, the validity of the transfer and the title to the instrument must be determined by the law of the place where the transfer was effected (*m*).

Consideration.

Where an Englishman issues an instrument in a foreign country, but makes it payable in England, the validity of the consideration for making it must be determined, it seems, by English law (*n*).

Sum payable.

962. In the event of an instrument drawn abroad being payable in this country, but the sum payable not being expressed in the currency of this country, the amount to be paid is, in the absence of some express stipulation, to be calculated according to the rate of exchange for sight drafts at the place of payment on the day on which the instrument is payable (*o*).

Duties of holder.

963. The duties of the holder with respect to presentment for acceptance or payment and the necessity for or sufficiency of a protest or notice of dishonour, or otherwise, are determined by the law of the place where the act is done or the instrument dishonoured (*p*).

Discharge.

964. In the matter of discharge, the rule to be followed when there is a conflict of laws is that the law of the place where the

bill having been accepted in Paris, but payable in London, interest was to be charged at the English, not the French, rate; and see *Gibbs* v. *Fremont* (1853), 9 Exch. 25.

(*i*) Bills of Exchange Act, 1882 (45 & 46 Vict. c. 61), s. 53 (2), p. 515, *ante*.

(*k*) *Ibid.*, s. 15, p. 464, *ante*.

(*l*) *Ibid.*, s. 72 (5); *Rouquette* v. *Overmann* (1875), L. R. 10 Q. B. 525.

(*m*) *Alcock* v. *Smith*, [1892] 1 Ch. 238; *Embiricos* v. *Anglo-Austrian Bank*, [1905] 1 K. B. 677 (see note (*d*), p. 562, *ante*).

(*n*) *Moulis* v. *Owen*, [1907] 1 K. B. 746, MOULTON, L.J., dissenting.

(*o*) Bills of Exchange Act, 1882 (45 & 46 Vict. c. 61), s. 72 (4); *Hirschfeld* v. *Smith* (1866), L. R. 1 C. P. 340, 353.

The day that the instrument is payable is governed by the law of the place where payment is to be made (see note (*l*), *supra*), and therefore in a country where days of grace are allowed they must be taken into consideration.

(*p*) Bills of Exchange Act, 1882 (45 & 46 Vict. c. 61), s. 72 (3); *Hirschfeld* v. *Smith*, *supra*; *Horne* v. *Rouquette* (1878), 3 Q. B. D. 514.

SECT. 15. Conflict of Laws.

particular contract affecting the party in question was made must prevail (*q*). The discharge of a contract by the law of a place where the contract was not made or to be performed is not a discharge of it in any other country (*r*). A statute of limitation, operating as it does, not as a discharge of a party, but merely as a possible bar to an action, does not by its existence in the country where the instrument was drawn or made relieve a party from liability in another country where the action is brought (*s*).

Part III.—Other Negotiable Instruments.

SECT. 1.—*Rules for determining Negotiability.*

Law governing other negotiable instruments.

965. Though bills of exchange, bankers' cheques, and promissory notes are the only instruments specifically dealt with by the codifying statute, there are many other instruments, as has been already noticed, to which the attribute of negotiability has gradually come to be ascribed, and which must now be regarded as having been definitely admitted to the same category (*t*). The branch of the law from which, apart from statute, these other instruments draw their authority is the law merchant. But the law merchant is a term which denotes not a permanently fixed and stereotyped body of law, but the accumulated product of the customs of trade to which sanction has from time to time been given by decisions of the Courts (*u*).

Recognition of usage.

966. Customs and usages of trade indeed vary from time to time just as they vary in one place and another, but there is nothing different in kind between the customs of a hundred years ago and the customs of to-day. If, therefore, the customs and usages of merchants in times past were recognised and admitted as part of the law merchant of that time, there is nothing in the nature of the case to prevent similar recognition being accorded to the customs and usages of merchants at the present day. And what is

(*q*) *Potter* v. *Brown* (1804), 5 East, 124, where it was held that a drawer having been discharged in bankruptcy in America, where the bill was drawn, could not be sued in England on the bill. And see *Allen* v. *Kemble* (1848), 6 Moo. P. C. C. 314; *Ralli* v. *Dennistoun* (1851), 6 Exch. 483.

(*r*) Story, Conflict of Laws, s. 342, quoted with approval in *Bartley* v. *Hodges* (1861), 30 L. J. (Q. B.) 352, by BLACKBURN, J., at p. 354; *Gibbs & Sons* v. *La Société Industrielle et Commerciale des Métaux* (1890), 25 Q. B. D. 399, *per* Lord ESHER, M.R., at p. 407. See title CONFLICT OF LAWS.

(*s*) *Huber* v. *Steiner* (1835), 2 Bing. (N. C.) 202, where, action being barred in France under a statute of limitations which prescribed a five-year limit, it was held that action might be brought in this country if within the time limit of the English statute.

(*t*) As to bills of lading and other instruments relating to the transfer of goods, *e.g.*, dock warrants, which in some respects resemble negotiable instruments, see titles SHIPPING AND NAVIGATION; SALE OF GOODS.

(*u*) See *Goodwin* v. *Robarts* (1875), L. R. 10 Exch. 337, *per* COCKBURN, C.J., at p. 352.

SECT. 1. Rules for determining Negotiability.

true of the law merchant in regard to time is true also, though to a more limited extent, in regard to place. A custom that is known and recognised by the law merchant as existing in one place may be absolutely unknown elsewhere (*a*). But the fact of cardinal importance is that the exigencies of trade are continually expanding, and the courts of this country are not slow in according recognition to the expedients devised by traders for satisfying them. Just as bills of exchange were succeeded in recognition by promissory notes, and the latter at some interval of time by bankers' cheques, so at the present day the privilege of negotiability is accorded to a variety of instruments entirely unknown to the lawyers or traders of the past.

Moreover, the very fact that the ways of commerce have so widened and the number of transactions in every department of trade so greatly multiplied has led inevitably to new customs and usages being more speedily devised, more speedily adopted, and more speedily recognised than in times past (*b*).

Requisites for negotiability.

967. There remain, however, always the same prime requirements with which an instrument must comply before it can be accorded negotiability. One of these requirements is the form of the instrument itself, the other the custom of trade in regard to it.

It must be in a form which renders it capable of being sued on by the holder of it *pro tempore* in his own name; and it must be by the custom of trade transferable, like cash, by delivery (*c*). Failure to comply with either of these requirements prevents the instrument being a negotiable instrument at all (*d*).

SECT. 2.—*What Instruments are negotiable.*

SUB-SECT. 1.—*Exchequer and Treasury Bills.*

968. Exchequer or Treasury bills of the British Government are negotiable instruments, and are thus expressed: "This bill entitles or order to the payment of etc." So long as the blank remains unfilled the bill is an instrument transferable by delivery; so soon as the blank is filled in it becomes an instrument payable to order. In either case it is negotiable (*d*).

Exchequer bills.

Exchequer bills have been recognised for nearly one hundred years as negotiable instruments (*e*). They were first issued in 1695, but are now regulated by the Exchequer Bills and Bonds Act, 1866 (*f*), as amended by the Treasury Bills Act, 1877 (*g*).

(*a*) *E.g.*, a bill operates in Scotland as an assignment of funds in the hands of a drawee available for its payment (see p. 515, *ante*), but not so in England. Compare *Lang* v. *Smyth* (1831), 7 Bing. 284. See generally, title CUSTOMS AND USAGES.

(*b*) *Edelstein* v. *Schuler & Co.*, [1902] 2 K. B. 144, *per* BIGHAM, J., at p. 154.

(*c*) Including indorsement and delivery in the case of an instrument payable to order.

(*d*) Compare *Crouch* v. *Credit Foncier of England* (1873), L. R. 8 Q. B. 374, *per* BLACKBURN, J., at p. 381; *Miller* v. *Race* (1758), 1 Smith, L. C., 11th ed. at p. 473. See note (*r*), p. 569, *post*.

(*e*) *Wookey* v. *Pole* (1820), 4 B. & Ald. 1; *Brandao* v. *Barnett* (1846), 12 Cl. & Fin. 787, at p. 805.

(*f*) 29 & 30 Vict. c. 25.

(*g*) 40 & 41 Vict. c. 2.

SECT. 2. What Instruments are negotiable.

They are issued for periods of four years (*h*), and the interest on them is fixed half-yearly according to the rate of interest current in the market.

Treasury bills.

Their place, however, is now to a great extent taken by Treasury bills, already referred to. The latter are issued subject to the provisions of the Treasury Bills Act, 1877 (*i*), as amended by the National Debt Act, 1889 (*k*), and by the regulations made for the time being by the Treasury (*l*). They are issued for periods of twelve months or less, and bear interest at the lowest rate (being 5 per cent. or less) at which subscription for them can be obtained (*m*).

Both Exchequer bills and Treasury bills are charged upon the Consolidated Fund (*n*).

SUB-SECT. 2.—*Bank Notes.*

Bank notes.

969. Bank notes are negotiable instruments (*o*). They are the notes issued by a banker against the reserve of gold held by him, and are in effect promissory notes made by him payable on demand. Such notes may not be made in England for a less sum than £5, and the negotiation in England of notes for a less sum than £5 made out of England is illegal (*p*).

Banks entitled to issue.

970. The making of bank notes in England is, with certain exceptions, the monopoly of the Bank of England. The exceptions are those banks which had the right to issue their own notes before May 6, 1844 (*q*). While the notes of such banks are negotiable, they are not currency in the sense of being legal tender (*r*), and even the banks issuing them, while compelled to redeem them, are not bound to take their own notes in payment of a debt.

Bank of England notes.

The notes of the Bank of England stand upon a different plane. They are treated as money, as cash in the ordinary course and transaction of business, which gives them the credit and currency

(*h*) By the Finance Act, 1905 (5 Edw. 7, c. 4), s. 7 (1), (3), exchequer bonds issued for the payment of similar bonds issued under the Supplemental War Loan Acts of 1900 (63 & 64 Vict. c. 2; 63 & 64 Vict. c. 61), and falling due in December, 1905, might be issued for a period of ten years.

(*i*) 40 & 41 Vict. c. 2.

(*k*) 52 & 53 Vict. c. 6.

(*l*) Under Treasury Bills Act, 1877 (40 & 41 Vict. c. 2), s. 9; see Statutory Rules and Orders Revised to December 31, 1903, xiii., *sub nom.* "Treasury Bills."

(*m*) Treasury Bills Act, 1877 (40 & 41 Vict. c. 2).

(*n*) Exchequer Bills and Bonds Act, 1866 (29 & 30 Vict. c. 25), s. 7; Treasury Bills Act, 1877 (40 & 41 Vict. c. 2), s. 5.

(*o*) *Raphael* v. *Bank of England* (1855), 17 C. B. 161.

(*p*) Bank Notes Act, 1826 (7 Geo. 4, c. 6), s. 3; Bank Notes (No. 2) Act, 1828 (9 Geo. 4, c. 65), s. 1. See further, title BANKERS AND BANKING, Vol. I., p. 574.

(*q*) Bank Charter Act, 1844 (7 & 8 Vict. c. 32), ss. 10, 11. See title BANKERS AND BANKING, Vol. I., pp. 571—573.

(*r*) Although, if offered as payment, they are a legal tender if not objected to as such at the time (*Guardians of the Poor of Lichfield Union* v. *Greene* (1857), 26 L. J. (EX.) 140, *per* BRAMWELL, B., at p. 142). Compare *Camidge* v. *Allenby* (1827), 6 B. & C. 373, *per* BAYLEY, J., at p. 382; title BANKERS AND BANKING, Vol. I., p. 574.

of money to all intents and purposes (*s*). They have been made by statute legal tender up to any amount except by the Bank of England itself (*a*).

SUB-SECT. 3.—*Post Office and Postal Orders.*

Post office and postal orders.

971. Post office money orders and postal orders are not negotiable. They may by the Post Office Regulations be presented by a banker unsigned if they bear the banker's stamp, but the effect of this is only to make the stamp of the banker a substitute for the signature to the receipt of the original payee (*b*).

SUB-SECT. 4.—*British and Foreign Bonds.*

Foreign bonds.

972. The bonds of a foreign Government (*c*), as also those of a foreign corporation (*d*), may be negotiable (*e*).

For them to be recognised as such here they must either purport on the face of them to be transferable by indorsement or delivery or be shown *aliunde* to be negotiable according to the law of the country of issue (*f*), and must be negotiable by custom in this

(*s*) *Miller* v. *Race* (1758), 1 Burr. 452, *per* Lord MANSFIELD, C.J., at p. 457.

(*a*) Bank of England Act, 1833 (3 & 4 Will. 4, c. 98), s. 6. Previously an order to pay in cash or Bank of England notes was invalid (*Ex parte Imeson, Re Seaton* (1815), 2 Rose, 225). See title BANKERS AND BANKING, Vol. I., p. 570.

(*b*) *Fine Art Society* v. *Union Bank of London* (1886), 17 Q. B. D. 705, 713.

(*c*) *Gorgier* v. *Mieville* (1824), 3 B. & C. 45; *A.-G.* v. *Bouwens* (1838), 4 M. & W. 171; *Heseltine* v. *Siggers* (1848), 1 Exch. 856; *Goodwin* v. *Robarts* (1875), L. R. 10 Exch. 337, affirmed (1876), 1 App. Cas. 476; *London and County Banking Co.* v. *London and River Plate Bank* (1888), 21 Q. B. D. 535; *London Joint Stock Bank* v. *Simmons*, [1892] A. C. 201, *per* Lord MACNAGHTEN, at p. 224: "The cedulas in question are foreign bonds with coupons attached, payable to bearer. Admittedly they pass from hand to hand on the Stock Exchange, and according to the evidence of the bank manager, who was not cross-examined on the point, they are dealt with as negotiable instruments. I do not see on what ground they are to be denied the quality of complete negotiability. In a matter of this sort, it is not, I think, desirable to set up refined distinctions which are not understood or are uniformly and persistently ignored in the daily practice of the Stock Exchange."

(*d*) *Venables* v. *Baring Brothers & Co.*, [1892] 3 Ch. 527, holding it to be immaterial that the bonds were secured by a mortgage of property to trustees; *Bentinck* v. *London Joint Stock Bank*, [1893] 2 Ch. 120; *Edelstein* v. *Schuler & Co.*, [1902] 2 K. B. 144. The case of *Earl of Sheffield* v. *London Joint Stock Bank* (1888), 13 App. Cas. 333, which is in apparent conflict with the above cases, was decided upon special facts, the bonds in question having been pledged with bankers, who, in the opinion of the court, should have made fuller inquiries than they did before accepting them. See *London Joint Stock Bank* v. *Simmons*, *supra*, *per* Lord MACNAGHTEN, at p. 225.

(*e*) No distinction is to be made for this purpose between the bonds of a foreign Government and those of a foreign corporation, except that a foreign Government can in no case be sued in this country either in its own name or in that of its agent (*Twycross* v. *Dreyfus* (1877), 5 Ch. D. 605). See title ACTION, Vol. I., pp. 18, 19. As to United States Government bonds, and bonds of the several States, and United States Treasury notes, which are all negotiable, see Daniel, Negotiable Instruments, 4th ed. s. 441, and as to coupon bonds generally in the United States of America, see *ibid.*, s. 1500.

(*f*) *Colonial Bank* v. *Cady* (1890), 15 App. Cas. 267, 285; *London and County Banking Co.* v. *London and River Plate Bank* (1887), 20 Q. B. D. 232, which was not appealed from on the point in the Court of Appeal (1888), 21 Q. B. D. 535.

SECT. 2. What Instruments are negotiable.

country (*g*). It is not sufficient to prove merely that they are negotiable in the country of issue (*h*).

It has further been suggested that a foreign instrument is not negotiable here unless negotiable where it was made (*i*); but it may be open to doubt how far this qualification would now be allowed to prevail.

Bonds issued by English companies.

973. An attempt was made to distinguish between the bonds of a foreign country or company and those issued by an English company in England (*k*). But the case in which this distinction was drawn has been overruled (*l*); and it is now settled that English and foreign bonds are upon the same footing.

So well established, indeed, is the fact that English debenture bonds payable to bearer are negotiable that in a recent case the judge stated that he would be prepared to presume the usage without proof thereof (*m*).

(*g*) *Easton* v. *London Joint Stock Bank* (1886), 34 Ch. D. 95, *per* BOWEN, L.J., at p. 113; *Bentinck* v. *London Joint Stock Bank*, [1893] 2 Ch. 120.

(*h*) See *Picker* v. *London and County Banking Co.* (1887), 18 Q. B. D. 515, where it was held that proof of the negotiability of Prussian bonds in Berlin was insufficient to establish their negotiability here. Otherwise, as is remarked by FRY, L.J., in that case, at p. 520, "if it were proved that cowries are part of the currency of Africa, they must be treated as money in this country, though there were no custom here to treat them as money." See, however, Daniel, Negotiable Instruments, 4th ed. s. 1500: "There no longer remains a shadow of doubt that the coupon bonds of the United States, of the several States, and of municipal and other corporations, when expressed in negotiable words, are as negotiable to all intents and purposes as bills of exchange or promissory notes."

(*i*) See notes to *Miller* v. *Race* (1758), 1 Smith, L. C., 11th ed. 463, at p. 479, where the learned author, discussing the case of *Lang* v. *Smyth* (1831), 7 Bing. 284, enunciates this rule. In that case TINDAL, C.J., at p. 293, had said: "These are not English instruments, recognised by the law of England, but Neapolitan securities brought to the notice of the court for the first time, and as judges we are not allowed to form an opinion on them unless supplied with evidence as to the law of the country whence they come."

It is, however, pointed out by the learned editors of Smith's Leading Cases, quoting further from TINDAL, C.J.'s judgment in *Lang* v. *Smyth*, *supra*, and citing a suggestion of Lord ESHER in *Picker* v. *London and County Banking Co.*, *supra*, at p. 518, that "evidence that an instrument is accustomably transferable from hand to hand in this country is *primâ facie* evidence that it is also so abroad" (1 Smith, L. C., 11th ed. at p. 480).

(*k*) *Crouch* v. *Credit Foncier of England* (1873), L. R. 8 Q. B. 374, 384.

(*l*) By *Goodwin* v. *Robarts* (1875), L. R. 10 Exch. 337, affirmed (1876), 1 App. Cas. 476. In that case the instrument, though a foreign one, was issued in England; and the Court of Exchequer Chamber in giving judgment says (L. R. 10 Exch. at p. 345): "We think it unnecessary to enter upon the question whether the contract thus entered into is to be considered as a Russian or an English contract." And see the whole question of the validity of the judgment in *Crouch* v. *Credit Foncier of England*, *supra*, discussed by KENNEDY, J., in *Bechuanaland Exploration Co.* v. *London Trading Bank*, [1898] 2 Q. B. 658, at pp. 669 *et seq.*

(*m*) *Per* BIGHAM, J., in *Edelstein* v. *Schuler & Co.*, [1902] 2 K. B. 144, at p. 155: "I go perhaps further than KENNEDY, J., intended to go" (*i.e.*, in the last cited case), "for I think that it is no longer necessary to tender evidence in support of the fact that such bonds are negotiable, and that the courts of law ought to take judicial notice of it." For form of such bonds, see Encyclopædia of Forms, Vol. V., p. 90.

What Instruments are negotiable.

974. Scrip to bearer issued for debenture bonds is also negotiable, there being no real distinction between the scrip and the bonds themselves (*n*).

Scrip.

975. On the same principle scrip certificates to bearer for shares in a joint stock company are negotiable (*o*), and so also are share warrants to bearer (*p*). Share warrants not to bearer are not negotiable instruments (*q*).

Share warrants.

American railroad share certificates.

The certificates for American railroad company shares are commonly issued with a blank form of transfer and of power of attorney at the back. On this blank form being signed, but not filled in, by the original holder of the share, the certificates are freely dealt in on the Stock Exchanges of this country and America as though they were negotiable instruments. They are not, however, so in fact, for by their form they are incapable of being put in suit by the party holding *pro tempore*. No doubt as between the parties to the transaction the transfer is entirely completed by the delivery of the certificates in the manner mentioned. But mere delivery is not of itself sufficient to pass the title in them. If delivered by or with the authority of the owner with intent to transfer them, such delivery will suffice for the purpose; but if there has been no intent on the part of the owner to transfer them, a good title can only be obtained as against him if he has so acted as to preclude himself from setting up a claim to them (*r*).

Dividend warrants.

976. The negotiability of dividend warrants was rendered doubtful by a decision (*s*) prior to the Bills of Exchange Act, 1882; but in other cases (*t*) it was incidentally assumed that they were negotiable, and the Act itself appears to contemplate their being so (*u*).

(*n*) *Goodwin* v. *Robarts* (1875), L. R. 10 Exch. 337, affirmed (1876), 1 App. Cas. 476.

(*o*) *Rumball* v. *Metropolitan Bank* (1877), 2 Q. B. D. 194.

(*p*) *Webb, Hale & Co.* v. *Alexandria Water Co.* (1905), 21 T. L. R. 572; compare *Stern* v. *R.*, [1896] 1 Q. B. 211. For forms of share warrants to bearer, see Encyclopædia of Forms, Vol. IV., pp. 597 *et seq.*

(*q*) *London and County Banking Co.* v. *London and River Plate Bank* (1887), 20 Q. B. D. 232, not dealt with by the Court of Appeal (1888), 21 Q. B. D. 535; *Colonial Bank* v. *Cady* (1890), 15 App. Cas. 267.

(*r*) *Colonial Bank* v. *Cady, supra, per* Lord HERSCHELL, at p. 285; and compare *Crouch* v. *Credit Foncier of England* (1873), L. R. 8 Q. B. 374, *per* BLACKBURN, J., at p. 381, citing with approval the notes to *Miller* v. *Race* (1758), 1 Smith, L. C., 11th ed. 463, at p. 473: "If either of the above requisites be wanting, *i.e.*, if it be either not accustomably transferable, or though it be accustomably transferable, yet if its nature be such as to render it incapable of being put in suit by the party holding it *pro tempore*, it is not a negotiable instrument, nor (apart from the question of estoppel) will delivery of it pass the property of it to a vendee, however *bonâ fide*, if the transferor himself have not a good title to it, and the transfer be made out of market overt."

(*s*) *Partridge* v. *Bank of England* (1846), 9 Q. B. 396.

(*t*) *E.g.*, *Lang* v. *Smyth* (1831), 7 Bing. 284; *Goodwin* v. *Robarts* (1875), L. R. 10 Exch. 337, 354.

(*u*) See Bills of Exchange Act, 1882 (45 & 46 Vict. c. 61), s. 97 (3) (d), which specially preserves the usage relating to dividend warrants and their indorsement, and *ibid.*, s. 95, which applies to them the provisions of that Act which

SECT. 2. What Instruments are negotiable.

SUB-SECT. 6.—*Circular Notes.*

Circular notes.

977. Circular notes are not negotiable instruments until filled in and signed, when they stand on the footing of bills or cheques (*w*).

Part IV.—Stamp Duties.

SECT. 1.—*What Instruments are chargeable.*

SUB-SECT. 1.—*In General.*

Instruments chargeable.

978. Bills of exchange and promissory notes are liable to stamp duty; both are for stamp purposes statutorily defined (*a*). In each case the statutory definition, while including all mercantile bills and notes, makes many other documents bills and notes for stamp purposes.

Ad valorem and fixed duty.

Bills of exchange for stamp purposes are liable to *ad valorem* duty unless they are payable on demand, or at sight, or on presentation

relate to crossed cheques. See also title BANKERS AND BANKING, Vol. I., pp. 600, 601. For form of dividend warrant, see Encyclopædia of Forms, Vol. IV., p. 617.

(*w*) *Conflans Stone Quarry Co.* v. *Parker* (1867), L. R. 3 C. P. 1; and see title BANKERS AND BANKING, Vol. I., p. 627.

(*a*) Bills are thus defined by the Stamp Act, 1891 (54 & 55 Vict. c. 39), s. 32:—

"For the purposes of this Act the expression 'bill of exchange' includes draft, order, cheque, and letter of credit, and any document or writing (except a bank note) entitling or purporting to entitle any person, whether named therein or not, to payment by any other person of, or to draw upon any other person for, any sum of money; and the expression 'bill of exchange payable on demand' includes—

"(a) An order for the payment of any sum of money by a bill of exchange or promissory note, or for the delivery of any bill of exchange or promissory note in satisfaction of any sum of money, or for the payment of any sum of money out of any particular fund which may or may not be available, or upon any condition or contingency which may or may not be performed or happen; and

"(b) An order for the payment of any sum of money weekly, monthly, or at any other stated periods, and also an order for the payment by any person at any time after the date thereof of any sum of money, and sent or delivered by the person making the same to the person by whom the payment is to be made, and not to the person to whom the payment is to be made, or to any person on his behalf."

Promissory notes are defined by *ibid.*, s. 33 (1), as including "any document or writing (except a bank note) containing a promise to pay any sum of money." For the non-mercantile notes covered by this definition as explained by s. 33 (2), see p. 572, *post*. Bank notes are expressly excluded from the definition or description of both bills and notes, being separately defined by s. 29 (1) as including—

"(a) Any bill of exchange or promissory note issued by any banker, other than the Bank of England, for the payment of money not exceeding one hundred pounds to the bearer on demand; and

"(b) Any bill of exchange or promissory note so issued which entitles or is intended to entitle the bearer or holder thereof, without indorsement, or without any further or other indorsement than may be thereon at the time of the issuing thereof, to the payment of money not exceeding one hundred pounds on demand, whether the same be so expressed or not, and in whatever form, and by whomsoever the bill or note is drawn or made."

or within three days after date or sight. In the excepted cases the fixed duty of 1*d.* is payable. All promissory notes, however, whether payable at sight or otherwise, are liable to *ad valorem* duty (*b*). An inland bill liable to *ad valorem* duty and an inland note must be stamped before issue. All bills and notes not stamped in accordance with the statutory provisions hereafter mentioned are void (*c*).

SUB-SECT. 2.—*Bills of Exchange.*

Non-mercantile bills of exchange.

979. With regard to non-mercantile (*d*) bills of exchange, the language of the present definition is a rearrangement of the component parts to be found in the older charge, and conditions of chargeability then required are no longer imposed. The bearing of the older cases on the present enactment is to show that documents not of themselves creating a liability to pay, but upon which an action might be founded by reason of the assent of the person requested to pay to that request, the assent being given to the person to receive the payment, are within the meaning of the statutory extension (*e*).

The main difficulty which has arisen in connection with documents within this statutory extension is whether a document capable of falling within it is chargeable as a bill or as an equitable assignment. The effect of the cases appears to be that a document capable of operating as an assignment either must be regarded as, by implication, excluded from the charge on bills, or, if included, is only made by statute invalid *quâ* bill, and not *quâ* assignment (*f*).

(*b*) Stamp Act, 1891 (54 & 55 Vict. c. 39), Sched. I.; *Oettinger* v. *Cohn*, [1908] 1 K. B. 582. See the scale set out in detail as amended by subsequent enactments, p. 579, *post*.

(*c*) See, for the detailed provisions, pp. 577, 578, *post*.

(*d*) By "non-mercantile" is meant bills which are made so for stamp purposes, but which, independently of statutory definition for those purposes, would not be bills at all.

(*e*) The cases under the Stamp Act, 1815 (55 Geo. 3, c. 184), are—*Hutchinson* v. *Heyworth* (1838), 9 Ad. & El. 375; *Walker* v. *Rostron* (1842), 9 M. & W. 411, where the document was not made payable to bearer or order nor delivered to payee, and therefore was held not to be a bill; *Parsons* v. *Middleton* (1847), 6 Hare, 261, where the document was held to be a bill, the original delivery being to the payee, though he was to, and did immediately, hand it over to the person directed to make the payment; *Jones* v. *Simpson* (1823), 2 B. & C. 318, where a document mentioning no definite sum was held not to be a bill. In *Emly* v. *Collins* (1817), 6 M. & S. 144; *Firbank* v. *Bell* (1817), 1 B. & Ald. 36; *Butts* v. *Swan* (1820), 2 Brod. & Bing. 78; *Lord Braybrooke* v. *Meredith* (1843), 12 L. J. (CH.) 289, the instruments were held to be bills, though in none of the cases would the instrument have been a bill by the law merchant.

(*f*) In the older cases of *Diplock* v. *Hammond* (1854), 5 De G. M. & G. 320, and *MacGowan* v. *Smith* (1856), 4 W. R. 690, the latter view appears to have been that of the court. In *Buck* v. *Robson* (1878), 3 Q. B. D. 686; *Fisher* v. *Calvert* (1879), 27 W. R. 301; *Adams* v. *Morgan* (1883), 14 L. R. Ir. 140, the former view is indicated. It does not appear, however, that the respective debtors ordered to pay in these three cases assented; and, in the absence of assent, the instrument would be enforceable only as an assignment. Still assent *ex necessitate* implies notice, and the implication of those decisions is that orders, falling within the language of the section as bills, upon which an action could be maintained by reason of assent or agreement to pay to the substituted creditor, are, if and when operative as equitable assignments, outside its scope and taxable as equitable assignments. See, as to equitable assignments generally, title CHOSES IN ACTION.

SECT. 1. What Instruments are chargeable.

The statutory extension now in force has been the subject of two decisions only (*g*).

Postdated bills.

980. If a bill of exchange be postdated, but when produced in court appears, according to the date inserted, to be properly stamped, it is receivable in evidence, notwithstanding that the person enforcing it took with notice of the true date, for the test of admissibility under the Stamp Act is whether it appears sufficiently stamped when tendered in evidence (*h*).

Bills in a set.

981. If drawn in a set according to the custom of merchants (*i*), one part only need be stamped; the others are exempt, unless issued or negotiated apart, and, on proof of loss or destruction of the duly stamped part, any other part, not issued or negotiated apart, though not stamped, may be admitted in evidence to prove the contents (*k*).

SUB-SECT. 3.—*Promissory Notes.*

Non-mercantile promissory notes.

982. For stamp purposes, in addition to mercantile promissory notes, duty is imposed on notes promising payment of a sum of money out of a particular fund which may or may not be available or on a contingency which may or may not happen (*l*). But to fall

(*g*) In *Rothschild & Sons* v. *Commissioners of Inland Revenue*, [1894] 2 Q. B. 142, a coupon or warrant for interest was held chargeable as a bill within the language of the Stamp Act, 1870 (33 & 34 Vict. c. 97), s. 48, partly on the ground that exemption 9 in the schedule to that Act, which in the circumstances was inapplicable, showed such a coupon to be within the charge, and partly in reliance on the words "any document or writing entitling or purporting to entitle any person, whether named therein or not, to payment by any other person of any sum of money therein mentioned." Such coupons, however, are now exempt from duty (Finance Act, 1894 (57 & 58 Vict. c. 30), s. 40; see p. 580, *post*). In *Committee of London Clearing Bankers* v. *Commissioners of Inland Revenue*, [1896] 1 Q. B. 222, a direction to a bank, in form to transfer a sum of money from the account of one customer to that of another customer in its books, given and taken as a mode of payment between those customers, was held to be a bill of exchange payable on demand within s. 32 (a) of the Stamp Act, 1891 (54 & 55 Vict. c. 39), as an order for payment of any sum of money out of a particular fund which may or may not be available.

(*h*) See *Gatty* v. *Fry* (1877), 2 Ex. D. 265; *Royal Bank of Scotland* v. *Tottenham*, [1894] 2 Q. B. 715. In the former case the real point is not brought out in the argument; in the latter the argument in favour of invalidity was put very clearly. See further title EVIDENCE.

(*i*) See Bills of Exchange Act, 1882 (45 & 46 Vict. c. 61), s. 71, and p. 560, *ante*.

(*k*) Stamp Act, 1891 (54 & 55 Vict. c. 39), s. 39.

(*l*) *Ibid.*, s. 33 (2). These words were first introduced in the Stamp Act, 1870 (33 & 34 Vict. c. 97), s. 49. Many of the older cases decided on the terms of the Stamp Act, 1815 (55 Geo. 3, c. 184), or earlier Acts, are no longer authorities. Under the former law it was clear that the consideration must be executed as distinguished from executory (*Ellis* v. *Ellis* (1820), Gow, 216; *Jarvis* v. *Wilkins* (1841), 7 M. & W. 410, *per* PARKE, B., at p. 412; and *Shelton* v. *James* (1843), 13 L. J. (Q. B.) 90), but this appears to have resulted from the circumstance that the then Stamp Act contemplated negotiable or mercantile notes only. But no promise to pay was a note within the statute of Anne (3 & 4 Anne, c. 9), s. 1, unless the money at the time of giving the note became due and payable by virtue thereof and not by virtue of a subsequent contingency which might perhaps never happen. Unless the promise was "to pay at all events," it was conditional. It might be contended that these old decisions are, in the ground on which they are based, really authorities for

within this extension the instrument must consist substantially of a promise to pay a definite sum of money (*m*), and nothing more (*n*). If the document would be a promissory note in all respects save for the contingency affecting the payment in the ordinary mercantile sense, then for stamp purposes it is a promissory note notwithstanding the contingency (*o*).

Form

No particular words are needed to make a note. A promise "to account with A. B. or to his order for £50" will do (*p*), provided the words used necessarily import payment in money, but not otherwise (*q*); nor will mere redundancy of expression or the introduction of terms of gratitude into an instrument which in substance amounts to a promise to pay a definite sum prevent the charge applying (*r*), nor any other addition which neither impairs nor adds to the substance of the obligation as a promise to pay a definite sum (*s*). Nor need the payee be named if it is clear by implication who he is (*t*).

Promise of definite sum and nothing else.

983. But there must be nothing more than the promise of the definite sum (*u*). If, therefore, by the instrument A. promises to pay B. three months after date a specified sum "and other sums which may be due to him," this is not a promissory note even as to the specified sum (*a*). This is also the case where part of an entire promise consists of an unliquidated demand, or where there is a promise to pay money and do an act (*b*). The charge does not extend to a promise to pay money as one of the terms of a business proposal subsequently accepted by the promisee (*c*), or to a document which, while promising to pay a fixed sum at a fixed date on

claiming promissory note duty, under the extension of note duty to conditional promises effected by the Stamp Act, 1891 (54 & 55 Vict. c. 39), s. 33 (2), on promises to pay where the consideration is executory. There is no decision on the point. POLLOCK, B., in *Mortgage Insurance Corporation* v. *Commissioners of Inland Revenue* (1887), 20 Q. B. D. 645, at p. 653, evidently thought otherwise (see the illustrations mentioned), though the point was not raised. In any case the extension would only apply to a unilateral obligation, and not to an ordinary contract containing reciprocal obligations, one of which is for a money payment.

(*m*) *Henderson* v. *Dawson* (1895), 22 R. (Ct. of Sess.) 895.

(*n*) *Mortgage Insurance Corporation* v. *Commissioners of Inland Revenue* (1888), 21 Q. B. D. 352.

(*o*) See cases cited in detail, notes (*d*)—(*g*), p. 574, *post*.

(*p*) *Morris* v. *Lee* (1725), 2 Ld. Raym. 1396; *Brooks* v. *Elkins* (1836), 2 M. & W. 74; *Shrivell* v. *Payne* (1840), 8 Dowl. 441; *Waithman* v. *Elsee* (1843), 1 Car. & Kir. 35. Contrast *Hopkins* v. *Abbott* (1875), L. R. 19 Eq. 222.

(*q*) *Horne* v. *Redfearn* (1838), 4 Bing. (N. C.) 433. And see *White* v. *North* (1849), 18 L. J. (EX.) 316. So in *Sibree* v. *Tripp* (1846), 15 L. J. (EX.) 318, a deposit of £500 to be returned on demand was held not to be a note on the ground that it was not a contract to pay money, but a deposit, the identical money to be returned (*per* PARKE, B., at p. 324).

(*r*) *Ellis* v. *Mason* (1839), 7 Dowl. 598.

(*s*) *Lovell* v. *Hill* (1833), 6 C. & P. 238.

(*t*) *Green* v. *Davies* (1825), 4 B. & C. 235.

(*u*) *Smith* v. *Nightingale* (1818), 2 Stark. 375; and *Ayrey* v. *Fearnsides* (1838), 4 M. & W. 168 ("and all fines according to rule").

(*a*) *Bolton* v. *Dugdale* (1833), 4 B. & Ad. 619; *Smith* v. *Nightingale, supra*.

(*b*) *Follett* v. *Moore* (1849), 4 Exch. 410.

(*c*) *Thomson* v. *Bell* (1894), 22 R. (Ct. of Sess.) 16.

SECT. 1. What Instruments are chargeable.

a contingency, contains alternative obligations under which instead of the defined sum there will be a fluctuating and undefined sum to be paid (*d*), or to a promise to pay money forming one of a number of stipulations (*e*). Moreover, an instrument which, though it specifies a definite sum, shows on its face that the payment is to be by way of indemnity, and therefore only for the amount of that sum that might at maturity turn out to be unpaid by the principal debtor, does not fall within the charge (*f*). But a promise to pay a sum of money on an event is a note, although if all the terms of the bargain of which this promise formed part had been expressed in the instrument, it would have been chargeable only as an agreement (*g*).

Effect of additions to the promise.

984. As a consequence of this characteristic of a promissory note, that it must consist substantially of a promise to pay money, and nothing more, it follows that any addition consistent with its character will not attract additional duty (*h*), whilst any addition inconsistent with it will constitute it a different "instrument" for the purpose of charge (*i*).

Instrument chargeable under two heads.

On the other hand, an instrument may be capable of charge as a promissory note within the statutory definition and yet chargeable under another head. This possibility could hardly arise in the case of an ordinary mercantile note (*k*).

(*d*) *Mortgage Insurance Corporation* v. *Commissioners of Inland Revenue* (1888), 21 Q. B. D. 352, *per* Lord ESHER, M.R., at p. 355, explaining *Yeo* v. *Dawe* (1885), 33 W. R. 739.

(*e*) *Mortgage Insurance Corporation* v. *Commissioners of Inland Revenue, supra.*

(*f*) *Dickinson* v. *Bower* (1897), 14 T. L. R. 146.

(*g*) *Smith* v. *Dean* (1900), 69 L. J. (Q. B.) 331.

(*h*) There is no separate and distinct matter within the Stamp Act, 1891 (54 & 55 Vict. c. 39), s. 4 (a).

(*i*) *Ibid.*, s. 1 and Sched. I. In *Yates* v. *Evans* (1892), 61 L. J. (Q. B.) 446, approved in *Kirkwood* v. *Carroll*, [1903] 1 K. B. 531, a provision in a joint and several note made by a principal and his surety for payment of a definite sum by instalments that time might be given to either without the consent of the other, without prejudice to the holder's rights, was held not to attract additional duty as an agreement.

(*k*) Even in the case of non-mercantile notes the examples are rare; but in *British India Steam Navigation Co.* v. *Commissioners of Inland Revenue* (1881), 7 Q. B. D. 165, an instrument under hand only, purporting on its face to be a debenture whereby a company engaged to "pay £100, the amount of this debenture," to A. or order, with coupons attached for the payment of interest half-yearly, was held chargeable as a debenture, and not as a promissory note. Again, in *Brown, Shipley & Co.* v. *Commissioners of Inland Revenue*, [1895] 2 Q. B. 598, one of a series of notes made on behalf of a foreign company containing an agreement with the holder that he should have the benefit of a certain security for its payment was held to be chargeable as a marketable security on evidence of its marketability on the Stock Exchange, and not as a note. See Stamp Act, 1891 (54 & 55 Vict. c. 39), ss. 82 (1) (b), 122 (1), and Sched. I., title "Marketable Security." By s. 8 of the Finance Act, 1897 (60 & 61 Vict. c. 24), where a county council or municipal corporation, under statutory powers, issue bills repayable not later than twelve months from their date and statutorily charged or secured on any property or rate, this statutory charge being referred to in the bill, such bills are, for the purposes of stamp duty, to be deemed promissory notes, and not marketable securities. Again, in *Speyer Brothers* v. *Commissioners of Inland Revenue*, [1907] 1 K. B. 246, affirmed (1908), 77 L. J. (K. B.) 302, one of a series of notes, which conferred no charge or right over property and consisted merely of a promise to pay, was held

SUB-SECT. 4.—*I. O. U.'s.*

SECT. 1. What Instruments are chargeable. I. O. U.'s.

985. An I. O. U. does not require a stamp (*l*)—it is evidence of an account stated, and not of money lent—but the addition of any terms beyond the amount may constitute it either an agreement or a promissory note and as such chargeable with duty (*m*).

SUB-SECT. 5.—*Foreign Bills and Notes.*

Foreign bills and notes.

986. Whether a foreign bill or note is duly stamped in accordance with the law of the place where it was drawn or made is immaterial—for stamp duty is, like evidence, a question depending on the law of the country in which action is brought—unless the effect of non-stamping there would be to deprive the instrument of validity (*n*). Even in such a case the bill or note would be enforceable here if stamped in accordance with our own law (*o*).

Definition for stamp purposes.

987. The distinction to be found in the Stamp Act, 1891, between inland and foreign bills differs from that in the Bills of Exchange Act, 1882 (*p*). For stamp purposes bills or notes actually, or purporting only to have been, drawn or made out of the United Kingdom (*q*) are foreign bills and notes; inland bills and notes are those in fact drawn and made here and which do not purport to have been drawn or made elsewhere. A foreign bill or note is only liable to duty if expressed to be payable, actually paid, or indorsed, or negotiated, in the United Kingdom (*r*).

SECT. 2.—*Considerations common to all Instruments.*

SUB-SECT. 1.—*Effect of Alteration.*

Effect of alteration.

988. Apart from the stamp laws, an alteration may merely avoid a bill or note, or may substitute on the same paper what is in

chargeable at the option of the Crown either as a promissory note or as a marketable security; but the note was by a foreign Government, coupons for payment of interest were attached, and on the evidence the court held that it was marketable on the London Stock Exchange and thus possessed an additional incident not part of the description of the instrument "promissory note," but part of the description of the instrument "marketable security."

For the stamping of marketable securities, see title REVENUE.

(*l*) *Fisher* v. *Leslie* (1795), 1 Esp. 426.

(*m*) See *Brooks* v. *Elkins* (1836), 2 M. & W. 74; *Waithman* v. *Elsee* (1843), 1 Car. & Kir. 35.

(*n*) *Alves* v. *Hodgson* (1797), 7 Term Rep. 241; *Clegg* v. *Levy* (1812), 3 Camp. 166; *Bristow* v. *Sequeville* (1850), 5 Exch. 275.

(*o*) Bills of Exchange Act, 1882 (45 & 46 Vict. c. 61), s. 72 (1) (a).

(*p*) Compare *ibid.*, ss. 4, 83 (4), p. 475, *ante*, with the Stamp Act, 1891 (54 & 55 Vict. c. 39), ss. 34, 36.

(*q*) The Isle of Man and the Channel Islands are out of the United Kingdom for stamp purposes (*Griffin* v. *Weatherby* (1868), L. R. 3 Q. B. 753).

(*r*) As to bills payable on demand, at sight, or on presentation, or within three days after date or sight, this liability is based on the Stamp Act, 1891 (54 & 55 Vict. c. 39), s. 35 (1). As to other bills or notes it would result, independently of s. 35 (1), from the language of *ibid.*, Sched. I., title "Bill of Exchange of any other kind whatsoever etc.," *e.g.*, if a foreign bill on demand, expressed to be payable here, were neither presented for payment, negotiated, nor paid here, but put in evidence, it would not appear to be chargeable. Compare *ibid.*, s. 14 (4), and see *Griffin* v. *Weatherby*, *supra*, *per* BLACKBURN, J., at p. 760: "must be stamped before it is paid, but . . . may be used in evidence" etc.

SECT. 2. Considerations common to all Instruments.

effect a new instrument (*s*). An alteration which duplicates a bill or note by substituting a new instrument needs a new stamp, and the want of it, duly impressed or affixed, avoids the substituted instrument (*t*). An alteration while the document is still incomplete as a bill or note (*u*), or after issue, if only for the purpose of correcting a mistake and making the instrument as drawn accord with the intent existing when issued, does not require a new stamp (*a*).

Alteration of foreign bills.

In the case of alterations of foreign bills the stamping of the original instrument, provided that it had been altered before any English stamp became affixable, would be immaterial (*b*), and if the stamp on the new instrument were duly affixed after the alteration, wherever made, no question could arise; so wherever an adhesive stamp may be used there is a means of overcoming the difficulty, but the means must be duly used (*c*).

SUB-SECT. 2.—*Admissibility in Evidence.*

Admissibility in evidence.

989. Save in criminal proceedings, an instrument liable to stamp duty, but unstamped, is not to be given in evidence or to be available for any purpose whatever (*d*). But the recollection of a defendant as to a loan may be challenged by an unstamped note, not admitted in evidence, being put into his hands in the witness-box (*e*).

Presumption as to lost bill.

If a bill or note is lost or destroyed it is presumed to have been duly stamped until the contrary is shown (*f*).

SUB-SECT. 3.—*Mode and Time of Stamping.*

Use of appropriated stamp.

990. An appropriated stamp (*g*) must be used (1) for all promissory notes; (2) for all bills, inland or foreign, liable to *ad valorem* duty. For bills, inland or foreign, liable to the fixed duty

(*s*) As to this see pp. 552, 555, *ante*.

(*t*) The first stamp has been exhausted by the original bill; the new instrument is unstamped, and the Stamp Act, 1891 (54 & 55 Vict. c. 39), s. 38 (1), prevents its enforcement.

(*u*) *I.e.*, before issue, and in the case of an accommodation bill issue is, for stamp purposes, when the bill is delivered to a holder for value. See *Downes* v. *Richardson* (1822), 5 B. & Ald. 674, and *Scholfield* v. *Earl of Londesborough*, [1894] 2 Q. B. 660.

(*a*) *Byrom* v. *Thompson* (1839), 11 Ad. & El. 31.

(*b*) Bills of Exchange Act, 1882 (45 & 46 Vict. c. 61), s. 72 (1) (a).

(*c*) As to the use of an adhesive stamp after execution, see p. 578, *post*.

(*d*) Stamp Act, 1891 (54 & 55 Vict. c. 39), s. 14 (4). These words differ materially from the language of the older enactments, under which it was held that the document might be put in to show improper stamping and consequent invalidity (*Smart* v. *Nokes* (1844), 6 Man. & G. 911), or a collateral purpose, *e.g.*, fraud, as in *Gregory* v. *Fraser* (1813), 3 Camp. 454. As to collateral purpose, see *Durie* v. *Fielding* (1893), 20 R. (Ct. of Sess.) 295, *per* Lord KINNEAR, at p. 299. Compare the words in the Stamp Act, 1891 (54 & 55 Vict. c. 39), s. 38 (1), as to the person taking or receiving such bill or note. Compare the Stamp Act, 1870 (33 & 34 Vict. c. 97), s. 17; and see *Interleaf Publishing Co.* v. *Phillips* (1884), Cab. & El. 315, and *Ashling* v. *Boon*, [1891] 1 Ch. 568.

(*e*) *Birchall* v. *Bullough*, [1896] 1 Q. B. 325.

(*f*) *Pooley* v. *Goodwin* (1835), 4 Ad. & El. 94; *Closmadeuc* v. *Carrell* (1856), 18 C. B. 36.

(*g*) Stamp Act, 1891 (54 & 55 Vict. c. 39), s. 10 (2). For the provision of such stamp by the Commissioners, see *ibid.*, s. 10 (1).

SECT. 2. Considerations common to all Instruments.

of 1*d.*, there is no appropriated stamp. But, whether appropriated or not, these stamps are in some cases required to be impressed, in some required to be adhesive, in others permitted to be either. The provisions, summarised, are as follows:—

All bills, inland or foreign, payable on demand, at sight or on presentation (*i.e.*, liable to the fixed duty of 1*d.*), may be stamped with either an impressed or an adhesive stamp (*h*). Inland or foreign bills payable "within three days after date or sight" must be stamped with an impressed stamp (*i*), as also must other inland bills and all inland notes (*j*). All other foreign bills and all foreign notes (*i.e.*, those liable to *ad valorem* duty) must be stamped with an adhesive stamp (*k*). An adhesive stamp may also be used to denote the duty upon a notarial act and upon the protest by a notary public of a bill or note (*l*).

Impressed and adhesive stamps.

991. As already stated, all bills and notes not stamped in accordance with the statutory provisions in that behalf are void (*m*). Stamping before execution is the controlling requirement; failure entails avoidance. This is the general principle, but the detailed provisions which follow somewhat mitigate the severity of the penalty.

Stamping before execution.

In cases in which a bill or note requires an impressed appropriated stamp, and has been written on material bearing an impressed unappropriated stamp of sufficient amount, there is power to restamp correctly subject to a penalty of 40*s.* if the instrument is not then payable, and £10 if it is (*n*). Except in this case, no bill or note can be stamped with an impressed stamp after execution (*o*), though apparently the prohibition, at least as to bills and notes which fall within the Bills of Exchange Act, 1882, would not exclude stamping an inchoate instrument complete in form, but not in effect. Such an instrument is not, though signed, a bill or note (*p*).

Stamping after execution where wrong stamp used.

992. If the duty on an inland bill payable on demand, at sight, or on presentation, is denoted by an adhesive stamp, cancellation of the stamp by the person signing the bill before he parts with it is required (*q*).

Use and cancellation of adhesive stamps.

(*h*) Stamp Act, 1891 (54 & 55 Vict. c. 39), s. 34 (1).

(*i*) The Finance Act, 1899 (62 & 63 Vict. c. 9), s. 10 (2), applies the fixed duty (imposed by the Stamp Act, 1891 (54 & 55 Vict. c. 39), s. 1 and Sched. I., on bills payable on demand at sight or on presentation) to these bills, but does not apparently extend the scope of s. 34 (1) of the latter Act, and in the absence of express provision (Finance Act, 1899, s. 2) an adhesive stamp may not be used; the commercial inconvenience may induce "extensive interpretation" if the question calls for decision.

(*j*) This follows from the Stamp Act, 1891 (54 & 55 Vict. c. 39), s. 2.

(*k*) *Ibid.*, s. 34 (2).

(*l*) *Ibid.*, s. 90.

(*m*) See p. 571, *ante*.

(*n*) *Ibid.*, s. 37 (1).

(*o*) *Ibid.*, s. 37 (2).

(*p*) See Bills of Exchange Act, 1882 (45 & 46 Vict. c. 61), ss. 21 (1), 84.

(*q*) Stamp Act, 1891 (54 & 55 Vict. c. 39), s. 34 (1). The provisions as to cancellation are to be found in *ibid.*, s. 8 (1). The provisions of the latter section differ from the corresponding provisions in the Stamp Act, 1870 (33 & 34 Vict. c. 97), s. 24, upon which *Viale* v. *Michael* (1874), 30 L. T. 463, was

SECT. 2. Considerations common to all Instruments.

Foreign bills and notes.

As to foreign bills and notes received in the United Kingdom unstamped, the person receiving must, before he presents for payment (*r*), negotiates, or pays such bill or note, affix a proper adhesive stamp, and should cancel it (*s*). In default of due cancellation, he incurs a penalty of £10 (*t*). In the hands of a *bonâ fide* holder of such bill or note, if an adhesive stamp is affixed and effectually cancelled when the bill or note comes into his hands, the stamp as to him shall be deemed duly cancelled, though it may not appear to have been affixed or cancelled by the proper person (*u*), and if on coming into the hands of the *bonâ fide* holder an adhesive stamp has been affixed, but not duly cancelled, he may cancel it, and thereupon the bill or note shall be as valid as if the person affixing the stamp had cancelled it (*w*).

Bill presented for payment unstamped.

As to any bill, inland or foreign, payable on demand, at sight, or on presentation, and presented for payment unstamped, the person to whom it is presented may affix and cancel an adhesive stamp as if he had been the drawer of the bill, and may thereupon pay the bill and charge the duty in account or deduct it, and the bill is then to be deemed, as far as stamp duty is concerned, valid, though this course does not free anyone previously in default from the penalty he has incurred (*x*).

Stamp on notarial act or protest.

The adhesive stamp on a notarial act or protest is to be cancelled by the notary public (*a*).

SUB-SECT. 4.—*Scale of Duties and Exemptions.*

Calculation of duty.

993. Duty is calculated on the principal sum irrespective of interest, even if ascertainable and from a date prior to that of the instrument (*b*). Where the principal sum is expressed in any foreign or colonial currency the duty is calculated on its value in British currency according to the rate of exchange on the day of the date of the instrument (*c*).

decided, where faint but legible cancellation by a hand stamp was held sufficient. The result would be the same now. Compare *M'Mullen* v. "*Sir Alfred Hickman*" *Steamship, Ltd.* (1902), 71 L. J. (CH.) 766.

(*r*) Not presentment for acceptance merely (*Sharples* v. *Rickard* (1857), 2 H. & N. 57), nor mere notice and demand of payment unaccompanied by a tender of the bill, for presentment for payment means presentment in accordance with mercantile usage (*Griffin* v. *Weatherby* (1868), L. R. 3 Q. B. 753). And see as to "negotiating" the same cases and *Cardwell* v. *Martin* (1808), 9 East, 190. Presentation for payment unstamped does not involve nullity (*Broddelius* v. *Grischotti* (1887), 14 R. (Ct. of Sess.) 536.

(*s*) Stamp Act, 1891 (54 & 55 Vict. c. 39), s. 35 (1).

(*t*) *Ibid.*, ss. 35 (3), 8 (3).

(*u*) *Ibid.*, s. 35 (2) (a).

(*w*) *Ibid.*, s. 35 (2) (b). As to these sub-sections, see *Pooley* v. *Brown* (1862), 11 C. B. (N. S.) 566; *Bradlaugh* v. *De Rin* (1868), L. R. 3 C. P. 286; and *Marc* v. *Rony* (1874), 31 L. T. 372.

(*x*) Stamp Act, 1891 (54 & 55 Vict. c. 39), s. 38 (2), (3).

(*a*) *Ibid.*, s. 90.

(*b*) *Pruessing* v. *Ing* (1821), 4 B. & Ald. 204; *Wills* v. *Noott* (1834), 4 Tyr. 726.

(*c*) Stamp Act, 1891 (54 & 55 Vict. c. 39), s. 6 (1). An instrument containing a statement of current rate of exchange, and stamped in accordance therewith, is deemed duly stamped unless and until it is shown that the statement is untrue, and that the instrument is in fact insufficiently stamped (*ibid.*, s. 6 (2)). For the mode of calculating the sum to be received by the holder in the event of dishonour, see p. 525, *ante*.

Scale of duty.

The scale upon which duty is charged is as follows (*d*):—

	£	*s.*	*d.*
Bill of exchange payable on demand or at sight or on presentation or within three days after date or sight (*e*)	0	0	1
Bill of exchange of any other kind whatsoever (*except a bank note*) and promissory note of any kind whatsoever (*f*) (*except a bank note*), drawn, or expressed to be payable, or actually paid, or indorsed, or in any manner negotiated in the United Kingdom :—			
Where the amount or value of the money for which the bill or note is drawn or made does not exceed £5	0	0	1
Exceeds £5 and does not exceed £10	0	0	2
,, £10 ,, ,, £25	0	0	3
,, £25 ,, ,, £50	0	0	6
,, £50 ,, ,, £75	0	0	9
,, £75 ,, ,, £100	0	1	0
,, £100—			
For every £100, and also for any fractional part of £100, of such amount or value	0	1	0

Foreign bills.

In the case of bills drawn and expressed to be payable out of the United Kingdom, when actually paid or indorsed or negotiated in the United Kingdom, these rates apply if the bill is for £50 or under; if for over £50, the duty is 6*d.* for every £100 and fractional part of £100 (*g*).

Notarial act or protest.

The duty on any notarial act or protest is 1*s.*, except that when the duty on a bill or note is less than 1*s.* the duty on the protest is the same as on such bill or note (*h*). An adhesive stamp may be used (*i*).

Exemptions.

994. The following documents are exempt from duty (*h*):—

(1) Bill or note issued by the Bank of England or the Bank of Ireland.

(2) Draft or order drawn by any banker in the United Kingdom upon any other banker in the United Kingdom, not payable to bearer or to order, and used solely for the purpose of settling or clearing any account between such bankers.

(3) Letter written by a banker in the United Kingdom to any other banker in the United Kingdom directing the payment of any sum of money, the same not being payable to bearer or to order, and such letter not being sent or delivered to the person to whom payment is to be made or to any person on his behalf.

(*d*) Stamp Act, 1891 (54 & 55 Vict. c. 39), Sched. I., as amended by the Finance Act, 1899 (62 & 63 Vict. c. 9), s. 10.

(*e*) Finance Act, 1899 (62 & 63 Vict. c. 9), s. 10 (2).

(*f*) Including a promissory note payable at sight, though it also falls within the statutory definition of a "bill of exchange payable at sight" (*Oettinger* v. *Cohn*, [1908] 1 K. B. 582).

(*g*) Finance Act, 1899 (62 & 63 Vict. c. 9), s. 10 (1).

(*h*) Stamp Act, 1891 (54 & 54 Vict. c. 39), Sched. I.

(*i*) *Ibid.*, s. 90.

SECT. 2. Considerations common to all Instruments.

(4) Letter of credit granted in the United Kingdom authorising drafts to be drawn out of the United Kingdom payable in the United Kingdom.

(5) Draft or order drawn by the Paymaster-General on behalf of the Court of Chancery in England or by the Accountant-General of the Supreme Court of Judicature in Ireland.

(6) Warrant or order for the payment of any annuity granted by the National Debt Commissioners, or for the payment of any dividend or interest on any share in the Government or Parliamentary stocks or funds.

(7) Bill drawn by any person under the authority of the Admiralty upon and payable by the Accountant-General of the Navy.

(8) Bill drawn (according to a form prescribed by His Majesty's orders by any person duly authorised to draw the same) upon and payable out of any public account for any pay or allowance of the army or auxiliary forces or for any other expenditure connected therewith.

(9) Draft or order drawn upon any banker in the United Kingdom by an officer of a public department of the State for the payment of money out of a public account.

(10) Bill drawn in the United Kingdom for the sole purpose of remitting money to be placed to any account of public revenue (*k*).

(11) Coupon or warrant for interest on a marketable security, whether attached to and issued with the security, or with an agreement or memorandum for the renewal or extension of time for payment of the security, or subsequently issued in a sheet (*l*).

(*k*) This only applies where the money remitted is already public money (*Committee of London Clearing Bankers* v. *Commissioners of Inland Revenue*, [1896] 1 Q. B. 222).

(*l*) The latter part of the exemption was added by the Finance Act, 1894 (57 & 58 Vict. c. 30), s. 40; it limits the application of the ruling in *Rothschild & Sons* v. *Commissioners of Inland Revenue*, [1894] 2 Q. B. 142. That case is still an authority that the coupon by itself is a bill, but if it satisfies the condition of the exemption it is not liable to duty. Coupons issued in respect of any debenture or stock certificate to bearer under the Local Loans Act, 1875 (38 & 39 Vict. c. 83), are by s. 19 of that Act to be deemed to have been attached to and issued with the security.

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